2007

David C. Matthews v. Olympus Construction, L.C. : Brief of Appellant

Utah Court of Appeals

Steven T. Waterman; Steven C. Strong; Brent D. Wride; Ray, Quinney and Nebeker; Counsel for Appellee.
Dwayne A. Vance; Miller, Vance and Thompson; Counsel for Claimant/Appellant.

IN THE UTAH SUPREME COURT

IN RE: OLYMPUS CONSTRUCTION, L.C.	Supreme Court No. 20070956
DAVID C. MATTHEWS, Claimant and Appellant,	Court of Appeals No. 20060739 District Court No. 020904299
vs.	
OLYMPUS CONSTRUCTION, L.C., Appellee.	

BRIEF OF APPELLANT

Appeal from the Utah Court of Appeals
affirming the
Third Judicial District Court, Salt Lake County
Honorable Tyrone E. Medley

Steven T. Waterman
Steven C. Strong
Brent D. Wride
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, Utah 84145
Telephone: (801) 532-1500

Counsel for Appellee

Dwayne A. Vance (7109)
Miller Vance & Thompson
P.O. Box 682800
2200 N. Park Avenue, Suite D200
Park City, Utah 84068-2800
Telephone: (435) 649-8209

Counsel for Claimant/Appellant

IN THE UTAH SUPREME COURT

IN RE: OLYMPUS CONSTRUCTION, L.C.	Supreme Court No. 20070956
DAVID C. MATTHEWS, Claimant and Appellant,	Court of Appeals No. 20060739 District Court No. 020904299
vs.	
OLYMPUS CONSTRUCTION, L.C., Appellee.	

BRIEF OF APPELLANT

Appeal from the Utah Court of Appeals
affirming the
Third Judicial District Court, Salt Lake County
Honorable Tyrone E. Medley

Steven T. Waterman
Steven C. Strong
Brent D. Wride
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, Utah 84145
Telephone: (801) 532-1500

Counsel for Appellee

Dwayne A. Vance (7109)
Miller Vance & Thompson
P.O. Box 682800
2200 N. Park Avenue, Suite D200
Park City, Utah 84068-2800
Telephone: (435) 649-8209

Counsel for Claimant/Appellant

[THIS PAGE INTENTIONALLY LEFT BLANK]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(a) (2001).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Whether the court of appeals correctly construed and applied relevant provisions of the Utah Revised Limited Liability Company Act in holding the district court could extend the period for rejecting Mr. Matthews' claim. (R. 1044-1060, 2057-2075, 2140-2146).

"We review the court of appeals' interpretation of the relevant statute for correctness, according no deference to its conclusions." *Regal Ins. Co. v. Canal Ins. Co.*, 2004 UT 50, ¶ 5, 93 P.3d 99.

2. Whether the court of appeals erred in affirming the district court's award of attorney fees and in imposing fees for the appeal. (R. 3010-3019).

"Whether a claim is 'without merit' is a question of law and we review it for correctness." *In re Sonnenreich*, 2004 UT 3, ¶ 45, 86 P.3d 712.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Resolution of the issues on appeal involves the interpretation of the following statutory provisions:

UTAH CODE ANN. § 48-2c-1305 (2001):

> (1) A dissolved company in winding up may dispose of the known claims against it by following the procedures described in this section.
>
> (2) A company in winding up electing to dispose of known claims pursuant to this section may give written notice of the company's

dissolution to known claimants at any time after the effective date of dissolution. The written notice must:

(a) describe the information that must be included in a claim;

(b) provide an address to which written notice of any claim must be given to the company;

(c) state the deadline, which may not be fewer than 120 days after the effective date of the notice, by which the dissolved company must receive the claim; and

(d) state that, unless sooner barred by another state statute limiting actions, the claim will be barred if not received by the deadline.

(3) Unless sooner barred by another statute limiting actions, a claim against the dissolved company is barred if:

(a) a claimant was given notice under Subsection (2) and the claim is not received by the dissolved company by the deadline; or

(b) the dissolved company delivers to the claimant written notice of rejection of the claim within 90 days after receipt of the claim and the claimant whose claim was rejected by the dissolved company does not commence a proceeding to enforce the claim within 90 days after the effective date of the rejection notice.

(4) Claims which are not rejected by the dissolved company in writing within 90 days after receipt of the claim by the dissolved company shall be considered approved.

(5) The failure of the dissolved company to give notice to any known claimant pursuant to Subsection (2) does not affect the disposition under this section of any claim held by any other known claimant.

(6) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

UTAH CODE ANN. § 78-27-56(1) (1988):

> (1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]

STATEMENT OF THE CASE

In January of 2002 a petition for judicial dissolution of Olympus Construction, L.C. ("Olympus") was filed. (R. 1-6). Initially a custodian was appointed for Olympus. (R. 504-506). On August 21, 2002, a Decree of Judicial Dissolution of Olympus was entered and the custodian was converted to a receiver for the purpose of winding up the business and affairs of Olympus. (R. 589-591). On May 6, 2003, Annette Jarvis was appointed as the successor receiver for Olympus and continues to act as its receiver today. (R. 771-778).

On December 2, 2003, Olympus filed a Motion for Declaratory Relief to Establish a Claim Bar Date and a Claim Filing Procedure (the "Claim Bar Date Motion"), and a Memorandum in support thereof (the "Claim Bar Date Memorandum") (copies of which are attached hereto as Addendum E for ease of reference). (R. 791-835). On February 26, 2004, the district court entered an order pursuant to the Claim Bar Date Motion setting June 30, 2004 as the date by which written notice of claims must be submitted pursuant to UTAH CODE ANN. § 48-2c-1305 (2001), or be forever barred as set forth in the statute. (R. 843-863).

On June 30, 2004, David C. Matthews timely filed a Notice of Claim asserting he was entitled to payment of a $100,000 commission arising from the previous purchase of real property in Summit County, Utah by Olympus. (R. 968).

The 90-day period to reject timely filed claims as set forth in UTAH CODE ANN. § 48-2c-1305(4) (2001) expired on September 28, 2004, without Olympus rejecting Mr. Matthews' timely filed claim.

On November 10, 2004, Olympus filed a motion requesting permission to repay loans to members of Olympus. (R. 988-995). Mr. Matthews opposed that motion, arguing that UTAH CODE ANN. § 48-2c-1308 (2001) requires payment to third party creditors prior to any payments to owners in a dissolution proceeding, and therefore his claim should be paid first as an approved claim pursuant to UTAH CODE ANN. § 48-2c-1305(4) (2001). (R. 996-1002).

On November 18, 2004, Olympus filed a motion requesting that a future date be set as a deadline by which Olympus would still be able to reject timely filed claims. (R. 1021-1038). Mr. Matthews opposed that motion on the grounds that the statutory deadline for Olympus to reject timely filed claims had already expired as set forth in UTAH CODE ANN. § 48-2c-1305(4) (2001), and Mr. Matthews filed a motion requesting that Olympus pay his claim as an approved claim. (R. 1044-1060). The district court rejected Mr. Matthews' argument that his claim should be paid as an approved claim, and a future date was set by which Olympus was required to reject timely filed claims. (R. 2085-2091, 2140-2146).

Olympus subsequently rejected Mr. Matthews' claim on April 14, 2005, which was within the extended time period established by the district court. (R. 2147-2156). Pursuant to the procedure established by the district court, Mr. Matthews filed a Claim Response on April 15, 2005 (R. 2187-2189) and an Amended Claim Response on May 12, 2005 (R. 2246-2259) to pursue his claim.

On December 20, 2005, the district court granted summary judgment in favor of Olympus as to Mr. Matthews' claim on the grounds that such claim was barred by the Utah broker licensing statutes and statute of frauds. (R. 3037-3039). On July 12, 2006, the district court entered findings of fact and conclusions of law to the effect that Olympus was entitled to an award of attorney fees from Mr. Matthews pursuant to UTAH CODE ANN. § 78-27-56 (1988) on the grounds that Mr. Matthews' pursuit of his claim was without merit, in bad faith, and for purposes of delay. (R. 3119-3137). On July 20, 2006, the district court entered an order setting the amount of attorney fees to be paid by Mr. Matthews. (R. 3155-3286).

This appeal was commenced on August 9, 2006. (R. 3320-3321).

In a written opinion filed on November 8, 2007, the court of appeals affirmed the district court's grant of an extension of time to Olympus to reject Mr. Matthews' timely filed claim, affirmed the district court's grant of summary judgment in favor of Olympus on the merits of Mr. Matthews' claim, affirmed the district court's grant of attorney fees to Olympus, and awarded attorney fees on appeal. *Matthews v. Olympus Construction, LC,* 2007 UT App 361, 173 P.3d 192.

STATEMENT OF FACTS

At all times relevant to the real estate commission that is the subject of Mr. Matthews' claim, he was properly licensed in the State of Utah as a real estate agent and was affiliated with Fred B. Law of Re-Max Brokers, L.C. as his supervising principal broker. (R. 2946-2948, 3111-3112).

In June of 1998, Olympus retained the services of Mr. Matthews and Re-Max Brokers, L.C. in relation to the acquisition of a parcel of property in Summit County, Utah by Olympus. A Real Estate Purchase Contract for that purchase was entered into on August 26, 1998, with a purchase price of $3,000,000 (R.2685-2696), and the purchase closed on December 3, 1998 (R. 2702-2703). At the closing, Re-Max Brokers, L.C. was paid a nominal commission for its services in the amount of $200. (R. 2703-2704). It was agreed that Olympus would pay Re-Max Brokers, L.C. a $100,000 commission in compensation for its services in assisting Olympus to acquire the property, but, in light of Olympus' limited cash flow at the time of purchase, that commission was deferred and payable when Olympus sold the property. (R. 2883-2884). The property was not sold until the latter part of 2003 as part of the judicial dissolution proceedings. (R. 779-790).

In 1999, Mr. Matthews and his wife Jane (who had previously acted as an associate broker for Re-Max Brokers, L.C.), terminated their business relationship with Fred B. Law as their supervising principal broker, and Jane Matthews became licensed as a principal broker. At that time, Mr. Law assigned to Jane Matthews his right to collect the $100,000 commission from Olympus. (R. 2946-2948). Jane

Matthews subsequently assigned to Mr. Matthews her right to collect the $100,000 commission from Olympus. (R. 2942-2944, 2946-2948, 3111-3112). This $100,000 commission is the subject of Mr. Matthews' claim. (R. 968).

SUMMARY OF ARGUMENT

Olympus purposely availed itself of the provisions of UTAH CODE ANN. § 48-2c-1305 (2001) to dispose of known claims by third party creditors. The plain language of § 48-2c-1305(4) states that if Olympus does not reject Mr. Matthews' timely filed claim within 90 days of receipt thereof then Mr. Matthews' claim shall be considered approved. By failing to reject Mr. Matthews' timely filed claim within the 90-day rejection period mandated by statute, Olympus has irrevocably approved Mr. Matthews' claim and should be required to pay the same without further inquiry. The district court does not have the equitable power to alter the statutorily mandated deadline for the rejection of claims.

An award of attorney fees is not warranted under UTAH CODE ANN. § 78-27-56 (1998) because Mr. Matthews' claim had merit notwithstanding the adverse rulings by the district court and the court of appeals. Mr. Matthews' arguments were based on the plain language of controlling statutes and/or the statutes at issue were reasonably susceptible to the interpretation advanced by Mr. Matthews. No Utah appellate court has directly addressed an assignment of a properly earned commission by a broker solely for purposes of collection. In short, Mr. Matthews' claim and other arguments were based in law and fact, albeit they were unsuccessful.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INTERPRETING AND APPLYING THE PROVISIONS OF UTAH CODE ANN. § 48-2c-1305(4) (2001) AND AFFIRMING THE EXTENSION OF THE STATUTORY DEADLINE FOR OLYMPUS TO REJECT TIMELY FILED CLAIMS.

In affirming the district court's grant of summary judgment in favor of Olympus, the court of appeals rejected Mr. Matthews' argument that his claim should have been deemed approved—because Olympus did not reject it in writing within the period required by statute—and thus should have been paid. As explained below, that was error.

A. Olympus and the district court relied upon and followed the procedure set forth in UTAH CODE ANN. § 48-2c-1305 (2001) in order to address known claims against Olympus.

The genesis of these legal proceedings is a judicial dissolution proceeding pursuant to the Utah Revised Limited Liability Company Act (Chapter 2c of Title 48 of the Utah Code) whereby Olympus was dissolved and its business affairs wound up. (R. 1-6). UTAH CODE ANN. § 48-2c-1213(2) (2001), which expressly addresses a judicial decree of dissolution, states:

> After entering the decree of dissolution, the court shall direct the winding up and liquidation of the company's business and affairs in accordance with Part 13.

Accordingly, it does not matter if the dissolution proceedings are pursuant to a judicial dissolution or a non-judicial dissolution, the winding up of the dissolved company's business and affairs is governed by Part 13, which includes UTAH CODE ANN. § 48-2c-1305.

As part of the judicial dissolution proceedings herein, the district court appointed a receiver to wind up the affairs of Olympus. Notably, nowhere in UTAH CODE ANN. § 48-2c-1212 (2001), which authorizes the district court to appoint a receiver for a dissolved company in a judicial dissolution proceeding, is there any suggestion that the district court may alter the statutory procedures and deadlines otherwise in force with respect to dissolution of the company. In fact, Paragraph 4 of the Successor Receiver Order entered on May 6, 2003, which appoints Annette Jarvis as the successor receiver in place of Alan Funk, states (emphasis added):

> Except as otherwise provided herein the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or *reject claims all as provided in Utah Code Ann. § 48-2c-1305* and 1306.

(R. 773).

It is noteworthy that the May 6, 2003 Successor Receiver Order only referenced the setting of dates for the barring of claims, and further referenced the fact that the claims would be accepted or rejected as provided by statute. No provision was made for Olympus to come back to the district court at some arbitrary time in the future to set a date by which Olympus must reject timely claims. This is consistent with the referenced statutes in that a date has to be established as a deadline for the submission of claims, but once the claim bar date has been set the acceptance or rejection of claims is governed by the referenced statutes and the time periods set forth therein.

Subsequently, Olympus expressly relied upon the language from the May 6, 2003 Successor Receiver Order quoted above and the provisions of UTAH CODE ANN. § 48-2c-1305 (2001) in filing the Claim Bar Date Motion and Claim Bar Date Memorandum on or about December 2, 2003. (R. 791-794). In fact, the Claim Bar Date Motion specifically states on pages 1 and 2 thereof (emphasis in original):

> This motion is being filed pursuant to the language of the Stipulated Order Approving Successor Receiver which provides in paragraph 4 as follows:
>
> > Except as otherwise provided herein **the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or reject claims all as provided in Utah Code Ann. § 48-2c-1305 and 1306.**

(R. 701-702). The Claim Bar Date Motion further specifically requests on page 2 that the district court enter an order (emphasis added):

> Establishing April 15, 2004, as the bar date for all claims to be filed against Olympus' receivership estate, or as soon thereafter to *comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2)*, and further ordering that to the extent creditor claims are not timely filed, they will be forever barred[.]

(R. 702).

The above language from the Successor Receiver Order is also quoted on page 2 of the Claim Bar Date Memorandum with the same language highlighted therein. (R. 796). The Claim Bar Date Memorandum also reiterates multiple times throughout (pages 6, 8 and 12) the request that April 15, 2004 be established as the claim bar date, "or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code § 48-2c-1305(2)." (R. 799; 802; 806).

The Claim Bar Date Memorandum further states on page 6 (emphasis added):

> The Receiver asserts that the proposed Notice of Deadline contains all of the necessary notices and information regarding how, when and where potential creditors must file their claims against Olympus' receivership estate *as required by Utah Code Ann. § 48-2c-1305.*

(R. 800). The Claim Bar Date Memorandum then proceeds to set forth the provisions of UTAH CODE ANN. § 48-2c-1305(2) (2001) verbatim on page 6 thereof. (R. 800). The Claim Bar Date Memorandum concludes by stating on page 12 (emphasis added):

> Finally, the Receiver further moves that all creditors be required to send a copy of their Notice of Claim, along with copies of all supporting documents sufficient to the Receiver. *The supporting documents will enable to Receiver to evaluate the claims and determine whether they should be allowed or objected to.*"

(R. 806).

The above statement is consistent with the provisions of UTAH CODE ANN. § 48-2c-1305(4) (2001) to the effect that once a claim has been timely filed prior to the claim bar date, "[c]laims which are not rejected by the dissolved company within 90 days after receipt of the claim by the dissolved company shall be considered approved." In other words, the supporting documents filed with the Notice of Claim will enable Olympus to evaluate whether timely filed claims should be rejected (within the 90 day statutory period) or allowed (either affirmatively acknowledged by Olympus or deemed approved per statute).

B. The plain language of UTAH CODE ANN. § 48-2c-1305(4) (2001) mandates that Olympus reject timely filed claims within 90 days of receipt or such claims shall be considered approved.

UTAH CODE ANN. § 48-2c-1305 (2001) sets forth a very specific procedure for addressing and disposing of known claims against a dissolved company. First, the dissolved company gives "written notice of the company's dissolution to known claimants," which explains that a known claim must be submitted in writing to the company by a specified date or, "unless sooner barred by another state statute limiting actions, the claim will be barred if not received by the deadline." § 48-2c-1305(2). The written notice must also "describe the information that must be included in a claim" and "provide an address to which written notice of any claim must be given to the company." *Id.* If a written claim is not submitted to the company on or before the deadline set forth in the written notice, then the claimant is forever barred from pursuing the claim against the dissolved company. § 48-2c-1305(3).

If "the dissolved company delivers to the claimant written notice of rejection of the claim within 90 days after receipt of the claim," the claimant is then required "to commence a proceeding to enforce the claim within 90 days after the effective date of the rejection notice" or once again the claimant will be forever barred from pursuing the claim against the dissolved company. *Id.* However, "[c]laims which are not rejected by the dissolved company in writing within 90 days after receipt of the claim by the dissolved company shall be considered approved." UTAH CODE ANN. § 48-2c-1305(4) (2001).

It is undisputed that Mr. Matthews timely filed a written Notice of Claim against Olympus on June 30, 2004. (R. 844; 968). Ninety days from the date of Olympus' receipt of Mr. Matthews' timely filed claim was September 28, 2004. However, Olympus did not reject Mr. Matthews' claim in writing until April 14, 2005, nine-and-a-half months after he filed it, and well outside of the 90-day rejection period plainly prescribed by statute. (R. 2147-2156).

The question is whether the court of appeals correctly construed UTAH CODE ANN. § 48-2c-1305(4) (2001) when it rejected Mr. Matthews' contention that his claim should have been deemed approved based on Olympus' failure to reject the claim within the statutory period. "'In construing any statute, [this court] examine[s] the statute's plain language and resort[s] to other methods of statutory interpretation[ ] only if the language is ambiguous. Accordingly, [the court] read[s] the words of a statute literally . . . and give[s] the words their usual and accepted meaning.'" *Anglin v. Contracting Fabrication Mach., Inc.*, 2001 UT App 341, ¶ 9, 37 P.3d 267 (quoting *Hercules, Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 9, 21 P.3d 231 (internal quotations omitted)). "In so doing, [the court] 'assume[s] that each term was used advisedly by the legislature.'" *Id.* (quoting *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875. "When interpreting a statute, it is axiomatic that this court's primary goal 'is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve.'" *Id.*, ¶ 11 (quoting *Biddle*, 1999 UT 110, ¶ 13 (internal quotations omitted)).

UTAH CODE ANN. § 48-2c-1305 (2001) is identical to UTAH CODE ANN. § 16-10a-1406 (1992) (which deals with the disposition of known claims by a dissolved corporation). However, the interpretation and application of these statutes has not been the subject of any reported opinion in Utah prior to this case.

These Utah statutory provisions are somewhat unique in that there does not appear to be any provision in any other state code that is similar to subsection (4) requiring that timely filed claims be rejected in writing within 90 days of submission thereof or such claims shall be deemed to have been approved. Even the model acts on which UTAH CODE ANN. § 16-10-1406 (1992) and UTAH CODE ANN. § 48-2c-1305 (2001) are based do not contain a provision similar to subsection (4) of these two Utah Code sections, but rather they are silent as to the deadline for a claim to be rejected and the effect of any failure to timely reject a claim. MODEL REVISED BUSINESS CORPORATION ACT § 14.06 (1984); UNIFORM LIMITED LIABILITY COMPANY ACT § 807 (1996). (Copies of which are attached hereto as Addendum F.)

However, it is not necessary to look beyond the plain language of the statute in order to ascertain the meaning and application of the term "shall be considered approved." Black's Law Dictionary, 6th Edition, defines "considered" to mean "[d]eemed; determined; adjudged." In reading these words literally, and giving them their usual and accepted meaning, particularly within the context in which these words are used in the statute, Mr. Matthews' claim should have been

considered approved, or deemed approved, or determined approved, or adjudged approved, and should have been paid without any further inquiry.

The fact that the claim is "considered approved" simply distinguishes this set of circumstances from a situation in which a dissolved company affirmatively accepts or admits the company's obligation to pay a claim. Rather than the claim being approved pursuant to the affirmative act of the company, the claim is "considered approved" or deemed approved as a matter of law because the company failed to reject the claim in writing within the statutorily prescribed time limit. The end result in both situations is the same: the claim must be paid. This result is consistent with the apparent purpose that the statute was meant to achieve—an efficient method for addressing and disposing of known claims by a dissolved company to bring about finality to the company's business and affairs—as highlighted by the fact that the Utah State Legislature intentionally inserted a unique clause into the statute by requiring rejection of timely filed claims within 90 days of receipt by the dissolved company.

C. The district court did not have the authority to extend the statutory deadline to reject timely filed claims, especially after such deadline had already expired.

The court of appeals concluded "that the trial court had the power to extend the time for rejecting claims and that Matthews's claims were properly rejected." *Matthews v. Olympus Construction, LC,* 2007 UT App 361, ¶ 18, 173 P.3d 192. The court of appeals came to this conclusion by reasoning that Part 12 of the Utah Revised Limited Liability Company Act governing dissolutions permits the judge

overseeing the dissolution to "appoint a receiver . . . with all powers and duties the court directs," with the court having "exclusive jurisdiction over the company and all of its property," and that the "court shall describe the powers and duties of the receiver . . . in its appointing order, which may be amended from time to time." *Id.* at ¶ 16. The court of appeals then went on to quote the May 6, 2003 Successor Receiver Order to the effect that the receiver's "powers may be specifically circumscribed or expanded by the terms of this order or any subsequent Order of the Court" and that "[n]othing in this Order shall prevent the Receiver from requesting augmentation, modification, or supplementation of her powers as Receiver to the full extent permitted by law or equity upon further application to the [c]ourt and after notice and a hearing." *Id.* at ¶ 17.

In other words, the court of appeals concluded that because the district court had the ability to describe the scope of the authority of the receiver, which authority may be modified from time to time, then the district court had the ability to grant the receiver the authority to reject timely filed claims even after the statutory deadline to reject timely filed claims had expired.

The court of appeals' reasoning is troubling because it ignores the plain language of UTAH CODE ANN. § 48-2c-1305(4) (2001), especially in the context of Parts 12 and 13 of the Utah Revised Limited Liability Company Act as a whole, and assumes that the authority of a receiver includes the ability to alter statutory deadlines by which Olympus as a dissolved company is otherwise bound.

None of the relevant statutes should be interpreted and applied in a vacuum, but rather they should be taken in context and interpreted and applied in a manner that harmonizes and gives effect to all statutory provisions. As set forth above, UTAH CODE ANN. § 48-2c-1213(2) (2001) expressly states that in the context of a judicial dissolution "the court shall direct the winding up and liquidation of the company's business and affairs in accordance with Part 13." While UTAH CODE ANN. § 48-2c-1212 (2001) allows a court to prescribe the authority of a receiver, it is a leap of logic to conclude that prescribing the authority of a receiver includes the ability to alter statutory deadlines by which the dissolved company is otherwise bound. There is a distinct difference between the authority of a receiver to act on behalf of a dissolved company and the overall legal obligations of the dissolved company. The requirement that the dissolved company reject timely filed claims within 90 days of receipt thereof is a statutory deadline by which the dissolved company itself is bound (not unlike a statute of limitations to pursue a particular claim on behalf of the dissolved company). While a receiver may have the authority to reject a timely filed claim on behalf of a dissolved company (or to affirmatively pursue a claim against a third party on behalf of the dissolved company), such authority cannot vitiate the general obligation of the dissolved company to reject claims within the statutorily mandated time period (or to pursue a claim against a third party prior to the expiration of the applicable statute of limitations).

The Utah State Legislature intentionally inserted a unique provision in UTAH CODE ANN. § 48-2c-1305(4) (2001) that requires a dissolved company to reject timely filed claims within 90 days of receipt thereof or such claims shall be deemed to be approved. In light of the overall framework of Parts 12 and 13 of the Utah Revised Limited Liability Company Act as a whole, and the specific language of § 48-2c-1305(4), when it comes to dealing with known claims against a dissolved company there is no basis for concluding that the Utah State Legislature intended to treat judicial dissolutions differently than non-judicial dissolutions, or intended to provide dissolved companies acting through receivers with an advantage over dissolved companies winding up without receivers.

Any dissolved company that elects to afford itself of the claim bar benefits available by following the procedures set forth in UTAH CODE ANN. § 48-2c-1305 (2001) is bound by the provisions thereof regardless of whether such dissolution occurs non-judicially or judicially, with or without a receiver. To hold otherwise would frustrate the plain intent of this statute and render meaningless the unique provision intentionally inserted by the Utah State Legislature.

D. Summary.

UTAH CODE ANN. § 48-2c-1305 (2001) makes it clear that the procedure set forth therein has the same effect as a statute of limitations, and if a claim is not timely submitted to the dissolved company then the claim is forever barred without the need for any further inquiry as to the merits of the claim. The limiting nature of

§ 48-2c-150 on claims against dissolved companies cut both ways. If the dissolved company does not reject in writing a timely filed claim within 90 days after the dissolved company's receipt of that claim, then the dissolved company is forever barred from disputing the claim further and the claim is considered approved. Thus, both the dissolved company and the claimant are on equal footing and control their own destinies with respect to their ability to pursue or defend against a claim. If the claimant misses the deadline to file the claim, the claim is barred, if the dissolved company misses the deadline to reject the claim, the claim approved and should be paid. If both the claimant and the dissolved company comply with the statutory deadlines, then the claimant still has an opportunity to assert its claim in a legal proceeding and the dissolved company still has an opportunity to defend against that claim.

It would be manifestly unjust, and contrary to the plain language of the statute, to allow Olympus to be excused from its clear failure to reject Mr. Matthews' timely filed claim within 90 days after its receipt thereof, especially when Mr. Matthews' claim indisputably would have been forever barred had he failed to timely file his claim. There is no equity in such a result, and no reason why a dissolved company under the control of a receiver (because the principals thereof are not capable of winding up the affairs of the dissolved company) should have such a monumental advantage over dissolved companies who are able to wind up their affairs without the assistance of a receiver.

While Olympus may not have been bound to dispose of known claims pursuant to the procedure set forth in UTAH CODE ANN. § 48-2c-1305 (2001), once Olympus elected to take advantage of the claim barring aspects of that statute then Olympus was bound to reject timely filed claims within the prescribed statutory period. There is simply no legal or equitable basis that justifies allowing Olympus to pick and choose what aspects of § 48-2c-1305 by which it is or is not bound.

Finally, even assuming, arguendo, that it was appropriate for the district court to extend the statutorily prescribed time period within which Olympus was required to reject timely filed claims, then similar to the manner in which extensions of other deadlines prescribed by statute or rule are typically made, such an extension should have been addressed prior to the expiration of the subject deadline rather than then allowing Olympus to decide in its sole and absolute discretion when it would decide to finally address third party claims (rather than trying to obtain approval for payments to owners in advance of payments to third party creditors contrary to statute).

In short, the court of appeals erred in failing to interpret and apply the plain language of UTAH CODE ANN. § 48-2c-1305(4) (2001) to the failure of Olympus to timely reject Mr. Matthews' claim in writing as mandated by statute. Accordingly, this Court should reverse the court of appeals' affirmance of the district court's judgment in favor of Olympus and remand with directions to the district court to enter an order requiring Olympus to pay the full amount of Mr. Matthews' timely filed claim as an approved claim.

If this Court grants the relief requested above, the award of attorney fees in favor of Olympus must also be reversed because Olympus will no longer be the prevailing party. If, however, this Court does not grant that relief, the court of appeals—for the reasons set forth below—still erred in affirming the district court's award of attorney fees and awarding additional attorney fees on appeal.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S AWARD OF ATTORNEY FEES AND IN IMPOSING FEES ON APPEAL.

The district court based its award of attorney fees on both Rule 56(g) of the Utah Rules of Civil Procedure (relating to an inadvertent mistake in an affidavit as to the identity of the principal broker at the time the subject commission was earned, which mistake was later corrected in another affidavit and had no meaningful effect upon the substantive arguments on the merits of Mr. Matthews' claim), and UTAH CODE ANN. § 78-27-56 (1988) (because the district court concluded Mr. Matthews' claim was without merit and pursued in bad faith). (R. 3122-3137, 3155-3286). However, in none of its orders or findings does the district court make any distinction as to the amount of attorney fees awarded pursuant to Rule 56(g) (which fees are limited to the amount of fees incurred with respect to the delay occasioned by the offending affidavit, and no such delay actually occurred) and the amount of attorney fees awarded pursuant to UTAH CODE ANN. § 78-27-56 (1988).

In affirming the district court's award of attorney fees and awarding fees on appeal, the court of appeals only references UTAH CODE ANN. § 78-27-56 (1988).

Matthews v. Olympus Construction, LC, 2007 UT App 361, ¶¶ 23 & 27, 173 P.3d 192.

In most every judicial proceeding, one party will prevail over the other to some extent. However, the mere fact that a court rejects a claim made by a particular party in a judicial proceeding does not automatically entitle the prevailing party to an award of attorney fees absent either a contractual provision expressly authorizing an attorney fee award or a statutory provision authorizing an attorney fee award based upon very specific facts and circumstances. *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1067 (Utah 1991).

A. Standard applicable to an award of attorney fees.

Notwithstanding the adverse outcomes for Mr. Matthews in the district court and the court of appeals, all of his arguments had merit for purposes of UTAH CODE ANN. § 78-27-56 (1988).

"Section 78-27-56 of the Utah Code is narrowly drawn and 'not meant to be applied to all prevailing parties in all civil suits.'" *In re Sonnenreich*, 2004 UT 3, ¶ 46, 86 P.3d 712 (quoting *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983)).

"To safeguard against an overly broad application, a prevailing party must demonstrate two distinct elements before a court may award attorney fees; namely, that the claims is (1) without merit, and (2) not brought or asserted in good faith." *Id.*

"A claim is without merit if it is 'of little weight or importance having no basis in law or fact.'" *Id.* at ¶ 47 (quoting *Cady*, 671 P.2d at 151).

B. Mr. Matthews' claim and other arguments have merit.

1. Deemed approved argument under § 48-2c-1305 has merit.

As set forth at length above, Mr. Matthews' argument that his claim should be paid as an approved claim under UTAH CODE ANN. § 48-2c-1305 (2001) because Olympus failed to reject such claim within the statutorily mandated time period has merit, i.e., such an argument cannot be characterized as having little weight or importance having no basis in law or fact. Regardless of the ultimate outcome of this case, Mr. Matthews' argument on this issue is a common sense argument based upon the plain language of a unique statute that had never been interpreted in any reported court decision. If such arguments are classified as "without merit" for purposes of awarding attorney fees under UTAH CODE ANN. § 78-27-56 (1988), then such a decision will have a chilling effect on perfectly legitimate advocacy for the initial interpretation of a statute by a court.

2. Assignment of commission argument has merit.

The district court ruled, and the court of appeals agreed, that Mr. Matthews' claim for a commission was without merit because Mr. Matthews was not a licensed principal broker as required by UTAH CODE ANN. § 61-2-18 (1985). However, there is no genuine dispute that the subject commission was initially earned and payable to Fred B. Law, as the properly licensed principal broker with whom Mr. Matthews was affiliated at the time through Re-Max Brokers, L.C. Had Mr. Law been the claimant in this matter, there would not be an issue involving the Utah broker licensing statutes. The issue

thus becomes whether a commission once properly earned and payable to a licensed principal broker can subsequently be assigned to a non-broker for purposes of collection, which is an issue of first impression for Utah appellate courts.

Notwithstanding the conclusionary statements made by the district court and the court of appeals to the contrary, as discussed more fully below no reported Utah opinion directly addresses whether UTAH CODE ANN. § 61-2-18 (1985) prohibits the assignment of a principal broker's right to collect a commission after the commission has been earned.

In *Young v. Buchanan*, 259 P.2d 876 (Utah 1953), an agent sought collection of a commission in his capacity as an agent in light of the fact that the licensed principal broker with whom the agent purported to be affiliated took no responsibility for the acts of the agent and the agent acted completely independent of the principal broker contrary to the intent and purpose of the licensing statutes. No allegation was even made that an assignment of the right to collect the commission was made by the principal broker to the agent after the commission had been properly earned under the supervision of the licensed principal broker.

In *Morris vs. John Price Assocs., Inc.*, 590 P.2d 315 (Utah 1979), a lawsuit to collect a commission was brought in the names of both the principal broker and the agent; while the judgment in favor of the agent was vacated, the judgment in favor of the broker was affirmed. Again, noticeably

absent was any purported assignment from the broker to the agent of the right to collect the commission, but rather the broker sought collection in the broker's own name.

In both *Diversified Gen. Corp. v. White Barn Golf Course, Inc.*, 584 P.2d 848 (Utah 1978) and in *Andalex Res., Inc. v. Myers*, 871 P.2d 1041 (Utah Ct. App. 1994), there simply was no licensed principal broker involved in the transaction and the unlicensed individual seeking collection of a finder's fee could not avoid the application of the broker licensing statutes.

While there is no Utah case law specifically addressing an assignment of a principal broker's right to collect a commission under UTAH CODE ANN. § 61-2-18 (1985), the established Utah law on assignments in general is that "[a]n assignment of an interest in a contract gives the assignee the same rights as the assignor." *West One Bank, Utah v. Life Ins. Co. of Virginia*, 887 P.2d 880, n3 at p. 883 (Utah Ct. App. 1994) (quoting *Jack B. Parson Co. v. Nield*, 751 P.2d 1131, 1133 (Utah 1988)). In other words, the assignee stands in the same shoes as the assignor, and has the same rights as the assignor. Accordingly, Mr. Matthews asserted that as an assignee of Mr. Law's right to collect the commission, Mr. Matthews stands in the same shoes as Mr. Law and should be allowed to collect the commission.

The Utah cases discussed above are consistent with the decisions of other courts faced with similar real estate licensing statutes that have expressly recognized the right of an assignee to sue and assert the same rights as the assigning real estate broker. For example, Section 4735.21 of the Ohio Revised Code states:

"No right of action shall accrue to any person, partnership, association or corporation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association or corporation was licensed as a real estate broker . . . ." In *Ritchie v. Weston, Inc.*, 757 N.E.2d 835 (Ohio Ct. App. 2001), the Ohio Court of Appeals upheld the right of a real estate agent to sue for a commission based upon an assignment of the commission to the agent from the principal broker. In issuing its ruling, the Ohio Court of Appeals explained that an assignee "stands in the shoes of the assignor." *Id.* at 837. The court further reasoned:

> Standing in the shoes of another means that the assignee stands in the shoes of the assignor or subrogor and succeeds to all the rights and remedies of the latter. There is no question that Grubb & Ellis is a licensed broker and had the right to bring this action, so the prerequisites of R.C. 4735.21 had been satisfied. As assignee, Ritchie therefore held the same right to bring the cause of action as Grubb & Ellis.

Id.

Similarly, in *Hodge v. Kun*, 868 F.2d 1069, 1072 (9th Cir. 1988), the Ninth Circuit Court of Appeals observed that "[u]nder Arizona law, a licensed real estate salesman who has been assigned his broker's right to a commission arguably is entitled to sue the principal directly for the commission."

Utah courts have expressly addressed the intent of the broker licensing statutes. The Utah Supreme Court has explained:

> It is apparent that the [broker licensing] statutes were enacted . . . to provide for registration and regulation of those engaged in the real estate business. . . . In *Koeberle v. Hotchkiss,* 8 Cal. App. 2d 634, 48

> P.2d 104, 107, Justice Crail stated: "The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be 'honest, truthful and of good reputation.'"

Andersen v. Johnson, 160 P.2d 725, 727 (Utah 1945). In a concurring opinion, Justice Wade of the Utah Supreme Court expressly stated:

> A reading of the statutes regulating real estate brokers makes it apparent they were enacted for the benefit of the public to protect them from dishonest and unscrupulous real estate agents.

Id. at 730 (quoted with approval in *Diversified Gen. Corp. v. White Barn Golf Course, Inc.*, 584 P.2d 848, 850 (Utah 1978).

As long as a commission is fully earned and payable to a licensed principal broker, then the purpose and intent of the broker licensing statutes—the protection of the public—has been satisfied. The mere collection of a properly earned commission that has been assigned to an individual who is not licensed as a principal broker is not contrary to the spirit and intent of the licensing statutes.

Moreover, Utah courts have expressly sanctioned the ability of an individual who is not licensed as a contractor to collect payment for services that can only be performed by a licensed contractor notwithstanding UTAH CODE ANN. § 58-55-604 (1994) which, similar to the broker licensing statute, prohibits actions to collect compensation for services requiring a contractor's license by anyone who is not properly licensed, as long as it can be proven that the purpose of the licensing statute—the protection of the public—has been satisfied. *See, e.g., A.K. & R. Whipple Plumb. & Heat. v. Aspen Constr.*, 199 UT App 86, ¶¶ 14-21, 977 P.2d 518.

The bottom line is that Mr. Matthews' argument that he was entitled to collect the subject commission (a) was consistent with established Utah law on assignments in general, (b) was consistent with case law from other jurisdictions with similar broker licensing statutes, (c) was not contrary to the spirit and intent of the Utah broker licensing statutes, (d) was consistent with the established Utah judicial exception for collection of compensation by an unlicensed contractor if it can be proven that the purpose of the licensing statute—the protection of the public—has been satisfied, and (e) presented an issue of first impression for Utah appellate courts. Mr. Matthews' arguments do have a substantial basis in law and fact. If such arguments are classified as "without merit" for purposes of awarding attorney fees under UTAH CODE ANN. § 78-27-56 (1988), then such a decision will have a chilling effect on legitimate advocacy with respect to matters of first impression when first addressed by a Utah court notwithstanding favorable rulings from other jurisdictions with similar statutes.

3. Statute of frauds argument has merit.

There is no genuine dispute that a brokerage relationship between Olympus on the one hand, and Re-Max Brokers, L.C. and Mr. Matthews on the other hand, was memorialized in writing as required by the statute of frauds. Indeed, even Olympus has essentially conceded that "the REPC, Commission Check, and Settlement Statement indicate only that Mathews, through his brokerage, Re-Max, was to be paid (and was paid) a total of $200.00 in 'Sales/Broker's Commission.'"

Memorandum of Law in Support of Receiver's Motion for Summary Judgment to Disallow Claim of David C. Matthews, filed July 6, 2005, at p. 5. (R. 2654).

However, the crux of Mr. Matthews' claim and the statute of frauds defense asserted by Olympus is that there was an oral modification of the brokerage agreement whereby an agent of Olympus promised that Olympus would pay Mr. Matthews and his principal broker an additional $100,000 commission related to Olympus' acquisition of the subject property, however that commission was to be deferred until Olympus subsequently sold the property (which is why the $100,000 commission was not referenced in the Settlement Statement). Even though the promise to pay the $100,000 commission was not reduced to writing, a well-established exception to the statute of frauds applies to this admitted oral modification of the brokerage agreement.

The statute of frauds "is not to prevent the performance or the enforcement of oral contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators." *English v. Standard Optical Co.*, 814 P.2d 613, 616 (Utah Ct. App. 1991) (quoting 2 *Corbin on Contracts* § 498 (1950)).

> The statute of frauds is a defense that can be waived by a failure to plead it as an affirmative defense, admitting its existence in the pleadings, or *admitting at trial the existence and all essential terms of the contract*. Since a purpose of the statute of frauds is to prevent fraud and perjury on the part of one claiming that another had [entered into the subject transaction] . . . , the one opposing the claim cannot complain if he admits the existence of the [subject transaction] . . . . "It cannot give a court any great satisfaction to permit a defendant to escape from performing a contract he admits he has made."

L.P. Bentley v. Potter, 694 P.2d 617, 621 (Utah 1984) (quoting 2 *Corbin on Contracts* § 320 at 153 (1950)) (other numerous citations omitted) (emphasis added).

Olympus, by and through Richard Jaffa (an agent of Olympus that conducted virtually all of Olympus' business dealings at the time), promised to pay Mr. Matthews and his principal broker the $100,000 commission on a deferred basis as an incentive for Mr. Matthews and his principal broker to assist Olympus in purchasing the subject property. This obligation has subsequently been admitted numerous times in front of multiple third-parties such that "there is no serious possibility that the assertion of the [$100,000 commission] . . . is false" and enforcement of such agreement as demonstrated by the various documents and "as supplemented by the oral agreement [regarding the $100,000 commission is] . . . not barred by the statute of frauds." *English*, 814 P.2d at 617.

A sworn affidavit of Mr. Matthews has been filed herein in which he fully explains the circumstances surrounding this oral promise on behalf of Olympus and the subsequent admissions of such obligation to numerous third parties. Affidavit of David C. Matthews, dated August 9, 2005. (R. 2858; 2884-2885). Notably, no affidavit signed under oath by Richard Jaffa has been filed in which he denies that such a promise and subsequent admissions occurred, and Olympus has otherwise never denied such an oral promise was made by Mr. Jaffa on behalf of Olympus (but rather Olympus has relied upon the statute of frauds and questioned Mr. Jaffa's authority to make such a promise that would be binding on Olympus).

Most notably, Mr. Matthews' claim was disposed of on summary judgment, and Mr. Matthews has been denied the opportunity to question Mr. Jaffa under oath at trial in order to elicit the admission at trial exception to the statute of frauds.

In *Wardley Corp. Better Homes & Gardens v. Burgess*, 810 P.2d 476 (Utah Ct. App. 1991), the primary case relied upon by the court of appeals in finding that Mr. Matthews' argument concerning the statute of frauds was without merit, there was no admission in the pleadings or at trial that could possibly constitute an exception to the statute of frauds as set forth above. To the contrary, the owner expressly denied the alleged oral agreement to extend the listing agreement and the broker argued that it was entitled to have this disputed issue of fact resolved at trial. *Id.* at 477. The exception to the statute of frauds arising from an admission in the pleadings or at trial was simply not at issue in this case.

Similarly, in *Machan Hampshire Props., Inc. v. Western Real Estate & Dev. Co.*, 779 P.2d 230 (Utah Ct. App. 1989), the other case relied upon by the court of appeals in finding that Mr. Matthews' argument concerning the statute of frauds was without merit, the admission in pleadings or at trial exception to the statute of frauds was not at issue. In fact, the broker tried to argue this exception on appeal based upon deposition testimony which the broker argued constituted an admission of the oral agreement to pay the commission, but the appellate court expressly refused to address the merits of this argument because it was raised for the first time on appeal. *Id.* at 236.

Mr. Matthews' argument with respect to a well-recognized exception to the statute of frauds does have a substantial basis in law (*L.P. Bentley v. Potter* and *English v. Standard Optical Co.*) and fact (Mr. Jaffa's admissions). Even if this Court disagrees with such argument, to characterize such argument as "without merit" for purposes of awarding attorney fees under UTAH CODE ANN. § 78-27-56 (1988) would have an undue chilling effect on legitimate advocacy based upon well-established legal principles and facts in support thereof.

CONCLUSION

Based upon the foregoing arguments, this Court should reverse the court of appeals' affirmance of the trial court's denial of Mr. Matthews' claim and judgment in favor of Olympus, and remand with directions to the trial court to enter an order requiring Olympus to pay the full amount of Mr. Matthews' timely filed claim as an approved claim due to the failure of Olympus to timely reject the claim in writing as mandated by statute.

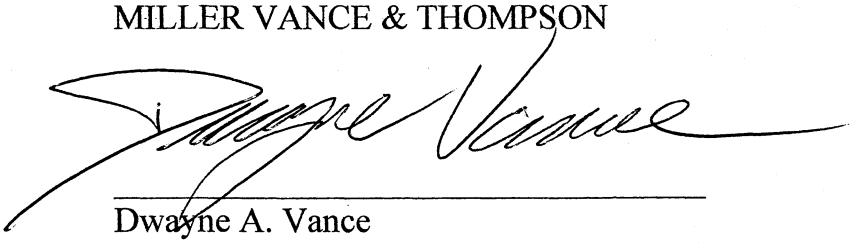
If the relief requested above is granted, then this Court must also reverse the award of attorney fees because Olympus would no longer be a prevailing party as required by UTAH CODE ANN. § 78-27-56 (1988).

Even if the relief requested above is not granted, then this Court should still reverse the awards of attorney fees by the district court and the court of appeals because the claim and various legal arguments advanced on behalf of Mr. Matthews were based in law and fact and were not "without merit" for purposes of awarding attorney fees under UTAH CODE ANN. § 78-27-56 (1988).

Dated this 9th day of April, 2008.

Respectfully submitted,

MILLER VANCE & THOMPSON



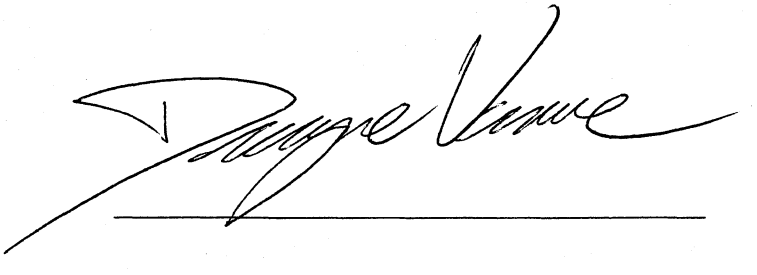
Dwayne A. Vance

Counsel for David C. Matthews
Claimant and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2008, I caused two (2) copies of the foregoing Brief of Appellant to be hand delivered, postage prepaid, to Steven T. Waterman, Steven C. Strong and Brent D. Wride, of Ray Quinney & Nebeker, counsel for Olympus Construction, L.C., Appellee herein, at the following address:

Steven T. Waterman
Steven C. Strong
Brent D. Wride
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, UT 84145



ADDENDUM A

Matthews v. Olympus Construction, LC, 2007 UT App 361, 173 P.3d 192

IN THE UTAH COURT OF APPEALS

----ooOoo----

In re Olympus Construction, LC _____ David C. Matthews, Appellant, v. Olympus Construction, LC, Appellee.	OPINION (For Official Publication) Case No. 20060739-CA F I L E D (November 8, 2007) 2007 UT App 361

Third District, Salt Lake Department, 020904299
The Honorable Tyrone E. Medley

Attorneys: Dwayne A. Vance, Park City, for Appellant
Steven T. Waterman, Brent D. Wride, and Steven C. Strong, Salt Lake City, for Appellee

---

Before Judges Billings, McHugh, and Thorne.

BILLINGS, Judge:

¶1 David C. Matthews appeals from the trial court's grant of Olympus Construction, LC's (Olympus) motion for summary judgment dismissing Matthews's claim for an unpaid real estate commission and the trial court's award of attorney fees to Olympus. We affirm and remand for the award of attorney fees that Olympus incurred on appeal.

BACKGROUND

¶2 In June 1998, Matthews worked as a licensed real estate agent for Re/Max Brokers, LC (Re/Max). In August 1998, Olympus retained Matthews's real estate services to help it purchase property in Summit County, Utah. The parties entered into a real estate purchase contract that provided a $200 commission to Matthews. Matthews contends that an agent of Olympus orally

promised to pay him an additional $100,000 commission when the property was sold.

¶3 In 1999, Matthews's wife, who had been an associate broker for Re/Max, became licensed as a principal broker. Matthews and his wife ended their business relationship with Re/Max and began their own brokerage firm called Re/Max Town and Country.

¶4 In January 2002, Olympus filed a Petition for Judicial Dissolution. The trial court appointed a receiver in 2002, and a successor receiver (Receiver) in 2003.[1] Pursuant to a motion filed by the Receiver, the court entered an order (the Bar Date Order) establishing June 30, 2004 as "the bar date for all claims to be filed against [Olympus's] receivership estate."

¶5 On June 30, 2004, the bar date, Matthews filed a Notice of Claim against Olympus for the $100,000 commission. In this notice, Matthew identified himself as the "Creditor," which the claim form defined as the "person or other entity to whom Olympus owes money or property." On October 6, 2004, the Receiver sent a letter to Matthews's counsel requesting that Matthews withdraw his claim and indicating that if he did not, the Receiver intended to "proceed with litigation." In November 2004, the Receiver requested that the trial court set a new date as the deadline for rejecting claims. Matthews opposed this motion, asserting that his claim was considered approved under Utah Code section 48-2c-1305(4) because Olympus had not rejected the claim within ninety days as required by that section. See Utah Code Ann. § 48-2c-1305(4) (2002). In March 2005, the trial court granted Olympus's request for a new rejection date and denied Matthews's motion asking the court to require the Receiver to pay his claim. The Receiver rejected Matthews's claim in April 2005 and warned Matthews that she would pursue a judgment for attorney fees if Matthews continued to pursue his claim.

¶6 The trial court granted Olympus's motion for summary judgment on the basis that Matthews's claim was barred by both the statute of frauds, see id. § 25-5-4(1)(e) (Supp. 2007), and Utah's real estate statutes concerning the collection of broker's fees, see id. §§ 61-2-10, 18 (2006). The trial court also awarded Olympus $25,112.50 in attorney fees after concluding that Matthews had acted in bad faith and that his claim was without merit. This amount included compensation for seventeen hours the Receiver spent in her capacity as an attorney. Matthews appeals

---

1. Only the actions of the successor receiver are at issue in this case. We refer to her as the Receiver, and make no further mention of the initial receiver.

both the trial court's entry of summary judgment and its award of attorney fees to Olympus.

ISSUES AND STANDARDS OF REVIEW

¶7 Matthews first contends the trial court erred in granting summary judgment to Olympus based on the statute of frauds and Utah's broker licensing statutes. Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). In determining whether the trial court's grant of summary judgment was appropriate, "we review the trial court's legal conclusions for correctness, affording those legal conclusions no deference," and "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Ault v. Holden, 2002 UT 33, ¶ 15, 44 P.3d 781 (internal quotation marks omitted).

¶8 Matthews next argues that the trial court incorrectly extended the date by which the Receiver was required to reject claims. Matthews contends that the Receiver was bound by Utah Code section 48-2c-1305(4), which mandates that claims must be rejected within ninety days or they will be "considered approved." Utah Code Ann. § 48-2c-1305(4). We review the trial court's interpretation of the statute for correctness without deference to the trial court. See Jeffs v. Stubbs, 970 P.2d 1234, 1240 (Utah 1998).

¶9 Additionally, Matthews argues that the trial court incorrectly awarded attorney fees to Olympus after finding that Matthews's claim was without merit and was pursued in bad faith. The court's determination that Matthews's claim was without merit is a question of law that we review for correctness. See Jeschke v. Willis, 811 P.2d 202, 203 (Utah Ct. App. 1991). The trial court's determination that Matthews's claim was filed in bad faith is a question of fact that we review under a "clearly erroneous" standard. See id.

¶10 Finally, we review the trial court's award of attorney fees for time the Receiver spent in her capacity as an attorney. The "trial court has 'broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard.'" Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998) (quoting Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)).

ANALYSIS

I. Statute of Frauds

¶11 Matthews contends that the trial court erred in granting summary judgment to Olympus on the basis of the statute of frauds. Under our statute of frauds, "[E]very agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" is void "unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement." Utah Code Ann. § 25-5-4(1)(e) (Supp. 2007). Matthews is correct that the original agreement, which contained the $200 commission, satisfies the statute of frauds. However, "if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable." Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985). Matthews admits that the $100,000 commission was promised to him orally and that no written documentation of it exists. Accordingly, the alleged modification for $100,000 is unenforceable under the statute of frauds.

¶12 Matthews attempts to circumvent this rule by pointing to a narrow exception to the statute of frauds. In Bentley v. Potter, 694 P.2d 617 (Utah 1984), the Utah Supreme Court held that "the statute of frauds is a defense that can be waived by . . . admitting its existence in the pleadings, or admitting at trial the existence and all essential terms of the contract." Id. at 621 (citations omitted). Matthews argues that this exception applies because a representative of Olympus promised him a $100,000 commission and Matthews himself filed an affidavit saying so. However, the Potter exception exists only to ensure that "the one opposing the claim cannot complain if he admits the existence of the guarantee." Id. It does not apply when the party making the claim simply asserts the admission in either the pleadings or at trial.

¶13 Matthews goes on to insist that a factual dispute exists--whether an oral promise to pay was made--and asks us to reverse the trial court's summary judgment ruling. This we decline to do. The essential factual issue here is not in question: there is no written agreement concerning the $100,000 commission. We addressed this issue in Wardley Corp. Better Homes & Gardens v. Burgess, 810 P.2d 476 (Utah Ct. App. 1991), where we upheld the trial court's ruling of summary judgment despite the outstanding factual question of whether the parties orally agreed to a modification of a written real estate agreement. See id. at 477. In Burgess, we held that whether there had been an oral agreement

was irrelevant, because such oral agreement would nevertheless be void under the statute of frauds. See id. We explained that

> [t]he very adoption of a statute of frauds reflects the [l]egislature's considered judgment that, with certain kinds of important arrangements, it is preferable to invalidate a few otherwise legitimate agreements because they were not written than to burden the system and the citizenry with claims premised on bogus, unwritten agreements.

Id. at 478. Furthermore, requiring such agreements and modifications to be in writing is consistent with our position that "a broker [or agent] must be presumed to know that an oral contract of employment for rendition of services in negotiating a sale of real estate for a commission is invalid." Machan Hampshire Props., Inc. v. Western Real Estate & Dev. Co., 779 P.2d 230, 234 n.8 (Utah Ct. App. 1989).

¶14 In sum, any modification to the original contract needed to be in writing. Because it was not, the modification is void under the statute of frauds. We therefore affirm the trial court's ruling on this matter.[2]

---

2. Because Matthews's claim is barred by the statute of frauds, we need not consider the alternative basis of the trial court's ruling that Matthews's claim was barred because it violated Utah's broker licensing statutes. Nevertheless, this alternative ground further demonstrates the lack of merit of Matthews's claim. In Utah, only licensed brokers are eligible to bring claims for unpaid commissions. See Utah Code Ann. § 61-2-18 (2006). Matthews does not suggest that he was ever a licensed broker. Instead he argues that, because a Re/Max broker assigned the claim to Matthews's wife, who then assigned the claim to him, he stands in the shoes of the broker and can therefore sue in his own name. However, our case law has been insistent that only licensed brokers may sue to collect commissions. See Morris v. John Price Assocs., Inc., 590 P.2d 315, 316 (Utah 1979) (holding that a real estate agent was barred from collecting a promised commission from the defendant because of the language of Utah Code section 61-2-18). See also Young v. Buchanan, 123 Utah 369, 259 P.2d 876, 878 (Utah 1953) (holding that Utah Code sections 82-2-18 and 82-2-10 (now numbered 61-2-18 and 61-2-10) unite to ensure that "any action to recover a fee or commission must be instituted and brought by the broker under whom the salesman is employed"). Accordingly, this argument also fails.

II. Section 48-2c-1305 of the Utah Revised Limited Liability Company Act

¶15 Matthews next contends that the Receiver was bound by the provisions of section 48-2c-1305 of the Utah Revised Limited Liability Company Act, which offers guidelines to dissolved companies that are in the process of winding up. See Utah Code Ann. § 48-2c-1305 (2002). Specifically, Matthews argues that the Receiver was bound by the deadline in subsection 4: "Claims which are not rejected by the dissolved company in writing within 90 days after receipt of the claim by the dissolved company shall be considered approved." Id. § 48-2c-1305(4). There is no dispute that Olympus did not reject Matthews's claim within ninety days. Thus, Matthews argues, the claim was "considered approved," which he asserts meant it had to be paid without any further inquiry.

¶16 We first consider whether the court was precluded from extending the period for the rejection of claims. Judicial dissolutions are enabled by Part 12 of the Utah Revised Limited Liability Company Act, see id. §§ 48-2c-1201 to -1214 (2002 & Supp. 2007). The judge overseeing the dissolution may: "(a) issue an injunction; (b) appoint a receiver . . . with all powers and duties the court directs; (c) take other action required to preserve the company's assets wherever located; and (d) carry on the business of the company until a full hearing can be held." Id. § 48-2c-1211(3) (Supp. 2007). Further, "[t]he court . . . has exclusive jurisdiction over the company and all of its property." Id. § 48-2c-1212(1) (2002). Finally, "[t]he court shall describe the powers and duties of the receiver . . . in its appointing order, which may be amended from time to time." Id. § 48-2c-1212(3).

¶17 In this case, the court's appointing order named the Receiver and indicated the scope of the court's continuing power over the Receiver's duties:

> [The Receiver] shall wind up the business and affairs of Olympus as provided in Part 13 of the Utah Limited Liability Company Act . . . [and] shall exercise all the powers of a receiver of a limited liability company provided for by law or equity, except as her powers may be specifically circumscribed or expanded by the terms of this Order or any subsequent order of the Court.
>
> . . . .

> Except as otherwise provided herein the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or reject claims all as provided in Utah Code . . . [s]ections 48-2c-1305 and 1306. To the extent permitted by law, all claims filed against Olympus shall be adjudicated and determined by this Court in and as part of this proceeding.
>
> . . . .
>
> Nothing in this Order shall prevent the Receiver from requesting augmentation, modification, or supplementation of her powers as Receiver to the full extent permitted by law or equity upon further application to the [c]ourt and after notice and a hearing.

(Emphasis added.) The court entered the Bar Date Order but did not address how claims filed were to be resolved. The Bar Date Order does not include any provision for the automatic allowance of claims. Rather, it states "the filing of a claim by a creditor against Olympus does not necessarily mean that it will be allowed. The Receiver . . . reserves the right to file an objection to all or a portion of any filed claim."

¶18 We conclude that because the statutory language governing receiverships grants great latitude to the trial court and because the trial court's orders explicitly state the trial court may expand and modify the powers of the Receiver, the court could extend the period for rejecting claims. Moreover, section 48-2c-1305 itself is permissive: "A dissolved company in winding up may dispose of the known claims against it by following the procedures described in this section." Id. § 48-2c-1305(1) (emphasis added). Further, the trial court's order makes it clear that the Receiver had the right to reject any claim as she did. We conclude that the court had the power to extend the time for rejecting claims and that Matthews's claims were properly rejected.[3]

---

3. We need not reach the issue of the consequences of a receiver not timely rejecting a claim, as we hold Matthews's claim was properly rejected.

III. Attorney Fees

A. Claims without merit and brought in bad faith

¶19 The trial court awarded attorney fees to Olympus based on rule 56(g) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 56(g), and Utah Code section 78-27-56, see Utah Code Ann. § 78-27-56 (2002), concluding that Matthews's claim was brought in bad faith and was without merit.

¶20 Rule 56 authorizes a court to award attorney fees if affidavits presented on summary judgment are brought in bad faith:

> If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney[] fees.

Utah R. Civ. P. 56(g). We review findings of bad faith for abuse of discretion. See Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991).

¶21 The trial court concluded that Matthews's legal arguments were "without merit" because he "knew (or [was] charged with knowing) that his claim was barred by the statute of frauds and the Utah broker commission statutes." Utah Code section 78-27-56 provides that "the court shall award attorney[] fees to a prevailing party if the court determines that the action is without merit and not brought or asserted in good faith." Utah Code Ann. § 78-27-56. A claim is without merit if it is "frivolous," is "of little weight or importance having no basis in law or fact," or if it "clearly [lacks a] legal basis for recovery." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). We review the trial court's conclusions that an argument is "without merit" for correctness, as this is a question of law. Jeschke, 811 P.2d at 203.

¶22 The trial court based its findings of bad faith on a series of sworn statements by Matthews, including affidavits, answers to interrogatories, and various motions that contained inconsistent information. Owing to these inconsistencies, the trial court concluded that at least some of the documents were offered in bad faith:

> Whether false statements were made in Matthews's sworn statements and admissions that the alleged $100,000 commission was promised to him and owed to him in his own right for his own efforts, or in Matthews's later sworn statements that the alleged $100,000 commission was promised and owed to Re/Max Town & Country with his wife as principal broker, or in Matthews's last representations in the last-minute "Supplemental Memorandum" that the alleged $100,000 commission was promised and owed to Fred B. Law and then indirectly assigned to him, it is clear that Matthews made materially false and patently inconsistent statements in this proceeding, and that Matthews knew (or is charged with knowing) that those statements were false when he made them.
>
> Matthews's assertions are not caused by a faulty memory because they are key, essential, and material facts including that Matthews was never a licensed principal broker.
>
> Matthews's own discovery responses along with the second affidavit of his wife, Jane Matthews, conclusively establish that Matthews knew his own affidavit on file with this [c]ourt contained false statements, yet neither Matthews nor his counsel withdrew or amended it.
>
> Matthews knew (or is charged with knowing) that his claim was barred by the statute of frauds and the Utah broker commission statutes.
>
> . . . .
>
> Utah case law supports a conclusion in this case that the Matthews's [c]laim was not asserted or pursued in good faith, because Matthews's presumed knowledge of Utah law respecting commission agreements and commission collections, and his materially false sworn statements, are "certainly sufficient to raise the inference of bad faith," and because Ma claim for "no other apparent reason" than to "drive up the costs

of litigation" in trying to recover a claim he knew he was not entitled to pursue.

(Citations omitted.)

¶23 We agree with the trial court that Matthews knew or should have known that his claim was barred by the statute of frauds and Utah's broker commission statutes. Further, given the trial court's repeated statements about the breadth of its supervision over the Receiver, and the permissive applicability of section 1305 of the Limited Liability Act, we conclude his claim for automatic payment of a meritless claim was also without merit.

B. Attorney fees for Receiver's time

¶24 Finally, Matthews challenges the trial court's award of attorney fees to Olympus for seventeen hours the Receiver spent in her capacity as an attorney. Matthews contends that attorney fees cannot be paid to the Receiver because she spent that time as a pro se litigant, not as an attorney for Olympus. We disagree.

¶25 It is true that we do not award attorney fees to lawyers who are representing themselves. See Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1374 (Utah 1996). However, the fact that the Receiver is standing in for Olympus does not make her a litigant on her own behalf. As a receiver, she is a court-appointed representative, not a litigant. The trial court did not abuse its discretion in awarding attorney fees for the small amount of time the Receiver spent in her capacity as an attorney.

¶26 Matthews also contends that any fees attributable to the administrative complaint Olympus pursued as well as any fees attributable to excess and unnecessary time Olympus spent on this matter are not recoverable. However, the trial court did not abuse its discretion in finding that the work counsel performed was necessary and that the amount of time spent was appropriate. The attorney fees awarded in connection with that finding are therefore affirmed.

CONCLUSION

¶27 We affirm. We conclude that the trial court correctly granted summary judgment where the alleged oral modification of the brokerage contract was void under the statute of frauds. We also agree with the trial court that it retained sufficient power over the case to grant an extension of time for rejection of claims as the Receiver requested. Moreover, we affirm the trial

court's award of attorney fees on the basis that Matthews's claims were without merit and the suit was brought in bad faith. We also affirm the award of attorney fees for the Receiver's work. We further award attorney fees to Olympus on appeal and remand for the calculation of such reasonable attorney fees.

_____
Judith M. Billings, Judge

¶28 WE CONCUR:

_____
Carolyn B. McHugh, Judge

_____
William A. Thorne Jr., Judge

ADDENDUM B

Minute Entry, March 29, 2005; unsigned Order Denying Mr. Matthews' Motion to Pay Claim (R. 2140-2146).

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN RE:	:	MINUTE ENTRY
OLYMPUS CONSTRUCTION, L.C.,	:	CASE NO. 020904299

David C. Matthews' Proposed Order Denying Motion to Pay Claim is filed unsigned for the reasons set forth in the Receiver's Objection. Unless the parties agree otherwise with approval of the Court, the Matthews claim will be resolved in accordance with the Claim Resolution Procedures approved by the Court.

This signed Minute Entry shall constitute the Order of the Court resolving the matters referenced herein.

Dated this_____day of March, 2005.

TR 3/29/05

TYRONE E. MEDLEY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 29 day of March, 2005:

James S. Lowrie
Rick L. Knuth
Ross I. Romero
Attorneys for Petitioners
170 S. Main, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444

Darryl J. Lee
Attorney for Respondents Scott Jaffa
and Sheri Jaffa
60 E. South Temple, Suite 500
Salt Lake City, Utah 84111

Annette W. Jarvis
Steven T. Waterman
Steven C. Strong
Attorneys for Receiver, Annette W. Jarvis
36 S. State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Dwayne A. Vance
Attorney for David C. Matthews
2200 N. Park Avenue, Suite D200
P.O. Box 682800
Park City, UT 84068-2800

J. Ashley

Dwayne A. Vance (7109)
MILLER VANCE & THOMPSON PC
P.O. Box 682800
2200 N. Park Avenue, Suite D200
Park City, Utah 84068-2800
Telephone: (435) 649-8209
Facsimile: (435) 649-8428
Attorneys for David C. Matthews

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

	unsigned **ORDER DENYING MR. MATTHEWS' MOTION TO PAY CLAIM**
IN RE: OLYMPUS CONSTRUCTION, L.C.	
	Civil No. 020904299
	Judge Tyrone Medley

A Motion to Pay Claim was filed on behalf of David C. Matthews ("Mr. Matthews"), a purported creditor of Olympus Construction, L.C. ("Olympus"), which was opposed by the Receiver. A Hearing was held on February 28, 2005 at 9:00 a.m. regarding this matter, with counsel appearing on behalf of both the Receiver and Mr. Matthews. Based upon the legal memoranda filed in support of and in opposition to the Motion, and the arguments of counsel at the Hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The disposal of claims against Olympus was previously addressed in this Court's Successor Receiver Order entered on May 6, 2003 ("Successor Receiver Order"), ¶ 4, which states, "the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or reject claims all as provided in Utah Code Ann. § 48-2c-1305 and 1306." The procedures referenced in the Successor Receiver Order were not mandatory, but rather were phrased in terms of discretionary procedures that the Receiver "may" pursue if desired.

2. Pursuant to the Receiver's authority as set forth in the Successor Receiver Order, on December 2, 2003 the Receiver filed a Motion for Declaratory Relief and Establishing a Claim Bar Date and a Claim Filing Procedure, whereby the Receiver sought approval for June 30, 2004 as a claim bar date by which date known claimants against Olympus were required to file a written Notice of Claim or their claim would be forever barred, and whereby the Receiver further sought approval for the notice of the requested claim bar date to be provided by the Receiver and approval for the form of the written Notice of Claim to be submitted by the claimants. The Receiver's motion for establishing the claim bar date was expressly based on Utah Code Ann. §§ 48-2c-1305 and -1306, as referenced in paragraph 4 of the Successor Receiver Order.

3. Because no objections to the Receiver's foregoing motion had been filed, on February 26, 2004 the Court entered an Order Granting Receiver's Motion for Declaratory Relief and Establishing a Claim Bar Date and a Claim Filing Procedure, which established June 30, 2004 as the claim bar date, and further approved the requested form of notice to known claimants and the written Notice of Claim to be filed by the claimants.

4. Mr. Matthews timely filed a Notice of Claim on June 30, 2004, claiming that Olympus owed him the amount of One Hundred Thousand Dollars ($100,000.00). His Notice of Claim merely represents prima facie evidence of the existence of such claim, and may be disputed by the Receiver pursuant to the claim resolution procedures established by this Court.

5. Mr. Matthews has filed a motion to pay his claim, arguing that his claim should be considered approved for payment under Section 48-2c-1305(4), which provides: "Claims which are not rejected by the dissolved company in writing within 90 days after receipt of the claim by the dissolved company shall be considered approved." It is undisputed that the Receiver did not reject Mr. Matthews' claim in writing within 90 days of receiving that claim.

6. The Court concludes that the Receiver is not bound by the 90-day time period in Section 48-2c-1305(4) for rejection of timely filed claims against Olympus after a claim bar date has been established, but rather the disposal of claims against Olympus in this judicial proceeding is subject to the equitable powers of this Court and the role of this Court as final arbiter of any and all claims against Olympus.

7. Accordingly, Mr. Matthews' Motion to Pay Claim is hereby denied.

Dated this _____ day of March, 2005.

BY THE COURT:

unsigned

Honorable Tyrone E. Medley,
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2005, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing proposed Order Denying Mr. Matthews' Motion to Pay Claim to:

Annette W. Jarvis
Steven C. Strong
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, UT 84145

Rick Knuth
Jones, Waldo, Holbrook & McDonough
170 S. Main Street, Suite 1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 E. South Temple, Suite 500
Salt Lake City, UT 84111

ADDENDUM C

Order Granting Receiver's Motion for Summary Judgment and Disallowing Claim of David C. Matthews (R. 3037-3039).

Order Prepared by:

Steven T. Waterman (4164)
Steven C. Strong (6340)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Attorneys for the Receiver

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

IN RE: **OLYMPUS CONSTRUCTION, L.C.**	ORDER GRANTING RECEIVER'S MOTION FOR SUMMARY JUDGMENT AND DISALLOWING CLAIM OF DAVID C. MATTHEWS Civil No. 020904299 Judge Tyrone Medley

On October 24, 2005, the Court conducted a hearing as scheduled upon good and sufficient notice on the Receiver's Motion for Summary Judgment to Disallow Claim of David C. Matthews (the "Motion"), which was filed on or about July 6, 2005 by Annette W. Jarvis in her capacity as the court-appointed receiver (the "Receiver") for Olympus Construction, L.C. in this receivership case.

Steven C. Strong, Ray Quinney & Nebeker P.C , appeared as counsel for the Receiver (who was also present), and David Thompson and Dwayne A. Vance, Miller Vance & Thompson, appeared as counsel for David C. Matthews.

Based on the memoranda, affidavits, and other papers filed in support of and in opposition to the Motion, and based on the arguments of counsel at the hearing, the Court made its findings and conclusions on the record at the conclusion of the hearing, which findings and conclusions are incorporated herein, and THE COURT HEREBY ORDERS AS FOLLOWS:

1. Summary judgment in favor of the Receiver and against David C. Matthews is granted as requested in the Motion;

2. The claim of David C. Matthews is barred by the Utah statute of frauds, Utah Code § 25-5-4, as well as by applicable Utah statutes governing real estate broker commissions, including Utah Code §§ 61-2-18 and 61-2-10; and

3. The claim of David C. Matthews is disallowed as a matter of law.

DATED this _____ day of November, 2005.

BY THE COURT:

_____
Tyrone E. Medley
Third Judicial District Court

Approved as to form:

_____
Dwayne A. Vance
Miller Vance & Thompson

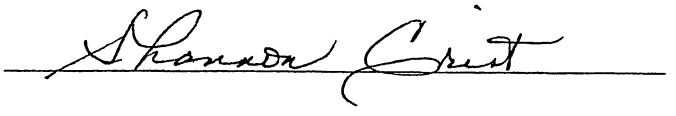
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing proposed ORDER was served by first-class U.S. Mail, postage prepaid, on this 26th day of October, 2005, to each of the following:

Dwayne A. Vance
2200 North Park Avenue #D200
P.O. Box 682800
Park City, UT 84068

James S. Lowrie
Rick L. Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111



845560.1

ADDENDUM D

Order and Judgment Granting Attorney Fee Award against David C. Matthews; Findings of Fact and Conclusions of Law Concerning Receiver's Motion for Attorney Fees Relating to claim of David C. Matthews (R. 3155-3286).

Order and Judgment prepared by:

Steven T. Waterman (4164)
Steven C. Strong (6340)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Attorneys for the Receiver

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

IN RE: OLYMPUS CONSTRUCTION, L.C.	ORDER AND JUDGMENT GRANTING ATTORNEY FEE AWARD AGAINST DAVID C. MATTHEWS Civil No. 020904299 Judge Tyrone Medley

Pursuant to this Court's *FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING RECEIVER'S MOTION FOR ATTORNEY FEES RELATING TO CLAIM OF DAVID C. MATTHEWS*, entered June 12, 2006, and this Court's *MINUTE ENTRY* entered June 12, 2006,

THE COURT HEREBY ORDERS AND DIRECTS THAT JUDGMENT BE ENTERED AS FOLLOWS:

1. Judgment shall be and hereby is entered in the amount of $25,112.50 against David C. Matthews and in favor of Annette W. Jarvis, Receiver of Olympus Construction, L.C., which amount is the reasonable attorney fees awarded in connection with the meritless claim pursued in bad faith by David C. Matthews in this receivership case; and

2. Although the receivership case involves multiple claims and multiple parties, the Court hereby determines that there is no just reason for delay and thus directs that entry of the judgment for attorney fees set forth above, and the related ORDER GRANTING RECEIVER'S MOTION FOR SUMMARY JUDGMENT AND DISALLOWING CLAIM OF DAVID C. MATTHEWS entered December 20, 2005, shall together constitute the final judgment, pursuant to Utah R. Civ. P. 54(b), respecting the claim of David C. Matthews and the related award of attorney fees.

DATED this 20 day of July, 2006.

BY THE COURT:

Tyrone E. Medley
Third Judicial District Court

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

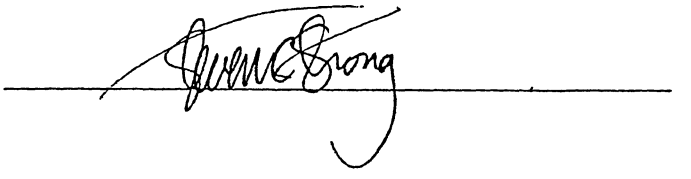
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing [Proposed] JUDGMENT ORDER AND JUDGMENT GRANTING ATTORNEY FEE AWARD AGAINST DAVID C. MATTHEWS was served by first-class U.S. Mail, postage prepaid, on this 29th day of June, 2006, to each of the following:

Dwayne A. Vance
2200 North Park Avenue #D200
P.O. Box 682800
Park City, UT 84068

James S. Lowrie
Rick L. Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111



881509v1

CLERK'S CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing JUDGMENT ORDER AND JUDGMENT GRANTING ATTORNEY FEE AWARD AGAINST DAVID C. MATTHEWS was served by first-class U.S. Mail, postage prepaid, on this 20 day of July, 2006, to each of the following:

Steven C. Strong
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Dwayne A. Vance
2200 North Park Avenue #D200
P.O. Box 682800
Park City, UT 84068

James S. Lowrie
Rick L. Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111

D. Ashley

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

In Re: OLYMPUS CONSTRUCTION, L.C.	Civil No. 020904299 Judge Tyrone Medley

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING RECEIVER'S MOTION FOR ATTORNEY FEES RELATING TO CLAIM OF DAVID C. MATTHEWS

Annette W. Jarvis, in her capacity as the court-appointed receiver (the "Receiver") of Olympus Construction, L.C. ("Olympus"), filed the Receiver's Motion for Attorney Fees Relating to Claim of David C. Matthews (the "Motion"). By the Motion, the Receiver seeks an order requiring David C. Matthews ("Matthews") to pay some of the Receiver's reasonable attorney fees incurred in responding to the Notice of Claim filed by Matthews (the "Matthews Claim") in this receivership case. The Motion is based on Utah Code Ann. § 78-27-56, which permits an award of attorney fees to a prevailing party if the action "was without merit and not brought or asserted in good faith," and on Utah R. Civ. P. 56(g), which permits an award of attorney fees if affidavits presented in summary judgment litigation "are presented in bad faith or solely for the purpose of delay." The Receiver claims that both Section 78-27-56 and Rule 56(g) apply to the Matthews Claim and entitle the Receiver to an award of her reasonable attorney fees incurred in opposing the Matthews Claim. The Court enters these findings of fact and conclusions of law in accordance with Utah R.Civ.P. 52(a).

FINDINGS OF FACT [1]

1. Matthews signed the Matthews Claim on June 7, 2004, and filed the claim in this receivership case on June 30, 2004.

2. Pursuant to the Matthews Claim, Matthews asserted that Olympus owes him $100,000 for his services as a real estate broker in connection with Olympus's purchase of real property in Summit County in 1998.

3. The face of the "Notice of Claim" form on which Matthews asserted his claim indicates that by signing and filing the claim, Matthews was swearing and attesting "to the truthfulness and accuracy" of the claim under penalty of perjury.

4. The "Notice of Claim" form clearly identifies "David C. Matthews" as the "Creditor," which the form defines as the "person or other entity to whom Olympus owes money or property."

---

[1] The relevant facts are of record in the following documents on file with the Court: (1) the Amended Claim Response on Behalf of David C. Matthews (including a copy of the Receiver's letter of October 6, 2004 attached as an exhibit thereto) (filed May 12, 2005); (2) the Memorandum of Law in Support of Receiver's Motion for Summary Judgment to Disallow Claim of David C. Matthews (filed July 6, 2005); (3) the Affidavit of Annette W. Jarvis (including a copy of the Matthews Claim and all supporting documents attached as exhibits thereto) (filed July 6, 2005); (4) the Affidavit of Carrie A. Hurst (including exhibits) (filed July 6, 2005); (5) the Memorandum in Opposition to Receiver's Motion for Summary Judgment (including the affidavits of David Matthews and Jane Matthews attached as exhibits thereto) (filed August 12, 2005); (6) the Reply in Support of Receiver's Motion for Summary Judgment to Disallow Claim of David C. Matthews (including Matthews' discovery responses attached as an exhibit thereto) (filed August 26, 2005); (7) the second Affidavit of Carrie A. Hurst (including exhibit) (filed August 26, 2005); (8) the Supplemental Memorandum in Opposition to Receiver's Motion for Summary Judgment (including affidavits of Jane Matthews and Fred B. Law attached as exhibits thereto) (filed October 20, 2005); and (9) the Receiver's Response to "Supplemental Memorandum" of David C. Matthews (filed October 21, 2005).

5. Nothing on the face of the Matthews Claim or in any of the documents Matthews submitted to the Receiver as attachments to the claim indicates that the alleged $100,000 real estate commission was promised or owed to any person or entity other than Matthews in his direct, individual capacity.

6. After investigating the grounds for the Matthews Claim, the Receiver determined that the claim was meritless.

7. The Receiver sent a letter dated October 6, 2004 to Matthews' counsel requesting that Matthews withdraw his claim and specifically notifying Matthews that if he did not, the Receiver intended to "proceed with litigation in the Receivership Court to obtain summary disallowance of the Matthews Claim" and would seek "court costs and attorneys fees from Mr. Matthews to the extent allowed by law."

8. The Receiver incurred substantial attorney fees on behalf of Olympus in various reasonable efforts to oppose the Matthews Claim, including (but not limited to) attempting to convince Matthews to withdraw the claim without litigation, successfully opposing Matthews' motion to compel immediate payment of the claim, formally opposing the claim pursuant to the court-approved claim resolution procedures in effect in this receivership case, and successfully prosecuting a summary judgment motion and obtaining a ruling disallowing the claim as a matter of law.

9. On May 12, 2005, Matthews filed his Amended Claim Response (the "Claim Response") addressing the Receiver's formal objection to the Matthews Claim.

10. Nothing in the Claim Response indicated that Matthews was claiming he was an assignee of a claim held by a real estate broker named Fred B. Law.

11. Matthews contended that the documents submitted to the Receiver in connection with the Matthews Claim "clearly establish the existence of a broker relationship between Mr. Matthews and Olympus." Claim Response at 2-3.

12. Matthews asserted that Olympus "agreed to pay Mr. Matthews a $100,000 commission" (Claim Response at 3), that the claimed $100,000 commission "represents compensation for services provided by Mr. Matthews" (Claim Response at 3), that Matthews "performed valuable services in conjunction with the acquisition of the subject real property in reliance upon the agreement to pay Mr. Matthews $100,000 in exchange for such services" (Claim Response at 7), that "the agreement to pay Mr. Matthews $100,000 was made . . . as an inducement for Mr. Matthews to provide services" (Claim Response at 8), and that "Mr. Matthews did not have a cognizable action against Olympus until Olympus breached its promise to pay Mr. Matthews the $100,000" (Claim Response at 9).

13. Matthews attempted to avoid the preclusive effect of the Utah statute of frauds by arguing, contrary to governing case law and without any supporting citations to the contrary, that the commission amount was not an essential contract term and need not be in writing.

14. Matthews argued that the statute of frauds did not apply because of a limited exception under Utah case law that only applies when a defendant has admitted, either in pleadings or under oath, that an oral contract exists.

15. Matthews knew that neither Olympus nor the Receiver ever admitted the existence of the alleged oral contract in any pleading or in any sworn statement.

16. Matthews had more than six years after the alleged oral promise was made in late 1998 to obtain a sworn statement from an authorized representative of Olympus as evidence of the alleged promise, but he failed to do so.

17. Matthews admitted that his attempt to obtain a signed writing from Richard Jaffa to evidence the alleged oral promise was unsuccessful.

18. After the Receiver raised the effect of the Utah broker commission statutes, Matthews attempted to avoid the preclusive effect of the statutes by arguing, contrary to his original position, that he was an assignee of a claim belonging to a principal broker and that he could pursue the assignor's claim in his own name.

19. In Request No. 14 of the Receiver's Requests for Admission pursuant to Utah R. Civ. P. 36, Matthews admitted the following: "Admit that your filing of the Matthews Claim and related papers in the receivership court is an attempt by you to obtain payment of the real estate commission from someone other than a principal broker."

20. In Request No. 16, Matthews admitted the following: "Admit that Re-Max Brokers, L.C. was the principal brokerage with which you were affiliated during the period August 1998 through December 1998."

21. In Interrogatory No. 4 of the Receiver's Interrogatories propounded to Matthews pursuant to Utah R. Civ. P. 33, Matthews identified all principal brokers with whom he was affiliated, and Matthews stated, in relevant part: "Jane Matthews principal broker in 1998," but Matthews made no mention of Fred B. Law.

22. In Interrogatory No. 6, Matthews identified "all persons who may have information concerning the Matthews Claim," including the names of twelve specific individuals, but did not list Fred B. Law.

23. In response to the Receiver's Requests for Production of Documents made to Matthews pursuant to Utah R. Civ. P. 34, the only document Matthews produced was a copy of a one-page "Certificate of Licensure" issued by the Utah Division of Real Estate concerning the real estate license of David C. Matthews, which Certificate clearly indicates that Matthews was licensed as an Associate Broker of "Re-Max Brokers" from February 1998 to March 1999, and did not become affiliated with "Re-Max Town & Country" until February 2001.

24. The Certificate is consistent with Matthews' response to Request for Admission No. 16 noted above, but is inconsistent with the false statements in his affidavit discussed below.

25. In his response to Request for Admission No. 6, Matthews admitted that at all relevant times he was "bound by the Utah statutes and administrative rules applicable to licensed real estate associate brokers."

26. In response to Request No. 10, Matthews admitted that he "personally asked Richard Jaffa to provide [to Matthews] a signed document indicating that Olympus had agreed to pay [Matthews] a $100,000 real estate commission in connection with Olympus's purchase of the Property in December 1998, but he [Jaffa] refused to do so."

27. In the Receiver's initial memorandum filed July 6, 2005 in support of her summary judgment motion, the Receiver argued that the Matthews Claim was barred as a matter of law by the Utah statute of frauds and also by Utah real estate commission statutes.

28. In Matthew's Notice of Claim, which he signed under penalty of perjury on June 7, 2004, in Matthew's Claim Response filed May 12, 2005, and in Matthew's sworn and binding answers to the Receiver's written discovery requests, Matthews stated unequivocally that the alleged oral promise to pay a $100,000 commission was made by Olympus directly to him and gave rise to a payment obligation Olympus owed directly to him.

29. On August 12, 2005, when Matthews filed his memorandum in opposition to summary judgment and related affidavits (after the Receiver pointed out that under Utah law only a principal broker could pursue a commission claim against Olympus), Matthews stated under oath that the alleged oral promise actually was made not to him but to "Re/Max Town and Country," and that his wife, as the principal broker of "Re/Max Town and Country," had assigned the claim to him.

30. On October 20, 2005, when Matthews filed his "Supplemental Memorandum" and related affidavits (after the Receiver pointed out the false statements in the two prior affidavits), Matthews changed his story again by asserting that it was not actually his wife who was the principal broker entitled to assert the claim against Olympus, but Fred B. Law, who had orally assigned the claim to Matthews' wife, who later orally assigned the claim to Matthews.

31. On August 12, 2005, Matthews filed his Memorandum in Opposition to the Receiver's motion for summary judgment, and in support thereof, he also filed the Affidavit of David C. Matthews (the "David Matthews Affidavit") and the Affidavit of Jane Astle Matthews (the "Jane Matthews Affidavit").

32. The David Matthews Affidavit contains false statements that directly contradict Matthews' prior representations and statements made under penalty of perjury including in

paragraph 4 of the affidavit wherein Matthews states that in 1998, he and his wife owed a real estate brokerage company in Park City named "Re/Max Town and Country," and that his wife was the principal broker.

33. The Certificate of Licensure in Matthews' own possession that he produced in response to the Receiver's document request clearly shows that Matthews did not become affiliated with Re-Max Town & Country until February 2001, more than two years after the December 1998 transaction.

34. The statement in paragraph 4 of the Matthews Affidavit directly contradicts Matthews' answer to Request for Admission No. 16.

35. In paragraphs 8 and 9 of the David Matthews Affidavit, Matthews states, that the alleged promise by Olympus to pay a $100,000 commission was made directly "to Re/Max" rather than to Matthews personally.

36. Paragraph 12 of the David Matthews Affidavit states that Matthews' pursuit of the $100,000 commission "has been in my capacity as the assignee from my wife of the Commission," which statement directly contradicts the statements Matthews made under penalty of perjury on the face of the Matthews Claim and his other statements and representations alleging that the $100,000 commission was promised to him personally and earned by him personally, and that he was pursuing the claim in his own right and in his own name as the "Creditor" to whom Olympus owed the money.

37. The Jane Matthews Affidavit contains similar false statements concerning Jane Matthews' alleged status as the principal broker of Re/Max Town and Country in 1998.

38. The false statements in the David Matthews Affidavit and the Jane Matthews Affidavit caused the Receiver to incur additional legal fees, including but not limited to those incurred in investigating the new allegations, obtaining a Certificate of Licensure concerning Jane Matthews, and pointing out those false statements to this Court in the Receiver's reply memorandum in support of summary judgment.

39. Nearly two months after the Receiver's reply memorandum was served, and only three business days before the summary judgment hearing, Matthews served a second "Affidavit of Jane Astle Matthews" admitting that her prior affidavit contained false statements, admitting that "Re-Max Brokers, L.C." (not Re/Max Town and Country) was the brokerage with which she and Matthews were associated in 1998, and admitting that she was not a principal broker at the relevant time.

40. Although the new affidavit of Jane Matthews contradicted and purportedly corrected some of her prior sworn statements regarding these facts, no new affidavit for David Matthews was submitted to withdraw or amend his own false affidavit on these same points.

41. The only affidavit of David Matthews on file with this Court contains materially false statements that Matthews' knows are false.

42. In addition to purporting to correct prior false statements in her affidavit, the new affidavit of Jane Matthews stated that an individual named Fred B. Law was the principal broker with which both she and Matthews were affiliated in 1998, and that Mr. Law had assigned the $100,000 commission claim to Jane Matthews, who in turn assigned the claim to Matthews.

43. Matthews filed the new affidavit of Jane Matthews on October 20, 2005 along with his "Supplemental Memorandum."

44. In the "Supplemental Memorandum," Matthews adopted his new "Fred Law assignment" theory as the basis for his claim, and he also included an affidavit of Fred B. Law.

45. In late October 2005, less than 3 business days before the summary judgment hearing and more than 16 months after Matthews signed the Matthews Claim under penalty of perjury, Matthews asserted for the first time that the $100,000 claim he was pursuing against Olympus was actually a claim of Remax Brokers, L.C., with Fred B. Law as principal broker that Matthews held only by way of an indirect, double oral assignment.

46. The Receiver incurred additional fees responding to the untimely and unauthorized Supplemental Memorandum and related supplemental affidavits.

47. At the conclusion of the summary judgment hearing held October 24, 2005, this Court disallowed the Matthews Claim and ruled that the claim was barred as a matter of law by the Utah statute of frauds and applicable provisions of Utah real estate commission statutes.

48. The actions taken by Matthews in support of the Matthews Claim were solely for the purpose of causing delay and needlessly increasing the cost of this litigation.

49. Matthews' improper actions in pursuing the Matthews' Claim were motivated by his financial desire of $100,000, as sought by the Matthews' Claim.

CONCLUSIONS OF LAW

1. The Matthews Claim was without merit and not asserted or brought in good faith.

2. Section 78-27-56 provides:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Utah Code § 78-27-56.

3. "Where a party has acted on a meritless claim and in bad faith, in most cases it would be inequitable not to award attorney fees." *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 31.

4. A claim is "without merit" if it is "frivolous" or "of little weight or importance having no basis in law or fact." *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 22.

5. The Matthews Claim was frivolous, and certainly was of "little weight" with "no basis in law or fact."

6. Governing Utah case law, as set forth in the Receiver's summary judgment memoranda, including *Young v. Buchanan*, 259 P.2d 876 (Utah 1953), strictly interprets the relevant statutory language and specifically prohibits any real estate agent or associate broker including Matthews, from pursuing a commission claim against anyone other than the principal broker, even if the agent or associate broker claims to hold an assignment from the principal broker.

7. Matthews cited no Utah case law to the contrary and incorrectly asserted that there was no applicable Utah case law, and failed to cite controlling Utah precedent. There is no

Utah case law that excuses Matthews' failure to comply with the governing statutory commission provisions.

8. Matthews' arguments had no basis in fact or law, and therefore were "without merit" for purposes of Utah Code Ann. § 78-27-56.

9. The Utah Supreme Court has ruled that claims with similarly weak or non-existent legal support are "without merit" supporting an award of legal fees under Utah Code Ann. § 78-27-56. *See Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 30; *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 22; *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998) (holding that "a finding that a party has attempted to avoid liability by testifying falsely will support a decision to award attorney fees if combined with a finding of bad faith").

10. The Utah Supreme Court has established that a party acts in "bad faith" for purposes of Utah Code Ann. § 78-27-56, under the standard of:

> the trial court must find that one or more of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others.

Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998).

11. Matthews' lack of an honest belief in the legal basis for his claim, and his knowledge that his pursuit of the claim would unjustly hinder and delay the Receiver in her attempts to administer and close the Olympus receivership estate, is evidenced by his contradictory representations and admissions.

12. Utah R.Civ.P. 56(g) provides:

> If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees.

13. Whether false statements were made in Matthews' sworn statements and admissions that the alleged $100,000 commission was promised to him and owed to him in his own right for his own efforts, or in Matthews' later sworn statements that the alleged $100,000 commission was promised and owed to Re-Max Town & Country with his wife as principal broker, or in Matthews' last representations in the last-minute "Supplemental Memorandum" that the alleged $100,000 commission was promised and owed to Fred B. Law and then indirectly assigned to him, it is clear that Matthews made materially false and patently inconsistent statements in this proceeding, and that Matthews knew (or is charged with knowing) that those statements were false when he made them.

14. Matthews' assertions are not caused by a faulty memory because they are key, essential, and material facts including that Matthews was never a licensed principal broker.

15. Matthews' own discovery responses, along with the second affidavit of his wife, Jane Matthews, conclusively establish that Matthews knew his own affidavit on file with this Court contained false statements, yet neither Matthews nor his counsel withdrew or amended it.

16. Matthews knew (or is charged with knowing) that his claim was barred by the statute of frauds and the Utah broker commission statutes.

17. Matthews admitted that he was a licensed associate broker at all relevant times and was bound to follow the governing statutes and regulations.

18. Matthews submitted more that 100 pages of documents to the Receiver as support for his claim, but he knew that nothing in any of those documents specified a $100,000 commission.

19. As a licensed real estate professional, Matthews is charged with knowledge that an alleged oral promise of a commission is unenforceable as a matter of law under the statute of frauds.

20. "[A] broker must be presumed to know that an oral contract of employment for rendition of services in negotiating a sale of real estate for a commission is invalid." *Machan Hampshire Properties, Inc. v. Western Real Estate & Development Co.*, 779 P.2d 230, 234 (Utah App. 1989).

21. As a Utah-licensed real estate professional, Matthews is charged with knowledge that under the plain language of governing Utah broker commission statutes, he was strictly prohibited from pursuing a claim in his own name against Olympus for a real estate commission.

22. In *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 23, the Utah Supreme Court upheld the trial court finding of "bad faith" under Utah Code Ann. § 78-27-56 because the claims plaintiff was asserting "had been sold by the bankruptcy trustee to Defendants in compliance with the order of the United States Bankruptcy Court."

23. A bad faith finding is appropriate when the "plaintiff knew of the sale and participated without objection in it, ... sufficient to raise the inference of bad faith on plaintiff's part." *Id.*

24. In *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998), the trial court found that the plaintiffs pursued their claims with "no other apparent reason than to harass . . . and/or to

drive up the costs of litigation," and the Supreme Court held that the finding was enough to satisfy the "bad faith" element of Utah Code Ann. § 78-27-56.

25. Utah case law supports a conclusion in this case that the Matthews Claim was not asserted or pursued in good faith, because Matthews' presumed knowledge of Utah law respecting commission agreements and commission collections, and his materially false sworn statements, are "certainly sufficient to raise the inference of bad faith," and because Matthews has pursued his claim for "no other apparent reason" than to "drive up the costs of litigation" in trying to recover a claim he knew he was not entitled to pursue. *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶23.

26. The actions taken by Matthews in support of his claim were solely for the purpose of causing delay and needlessly increasing the costs of this litigation.

27. Each of the requirements of Utah Code Ann. § 78-27-56 have been satisfied.

28. Each of the requirements of Utah R.Civ.P. 56(g) have been satisfied.

29. The Receiver is entitled to recover her reasonable attorney fees incurred in defending against the Matthews Claim.

DATED this _____ day of May, 2006.

BY THE COURT

_____
Judge Tyrone E. Medley

CERTIFICATE OF SERVICE

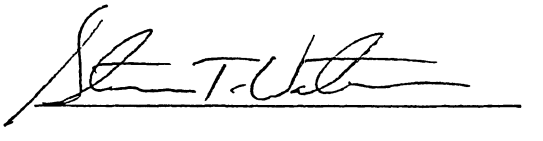
I hereby certify that a true and correct copy of the foregoing proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING RECEIVER'S MOTION FOR ATTORNEY FEES RELATING TO CLAIM OF DAVID C. MATTHEWS was mailed first class and electronically emailed on this 5 day of May, 2006, to each of the following:

Dwayne A. Vance
2200 North Park Avenue, #D200
P.O. Box 682800
Park City, UT 84068
vance@millervance.com

Rick L. Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101
rknuth@joneswaldo.com

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111
djlee@woodcrapo.com

To the Court:
janeth@email.utcourts.gov



873755v1

ADDENDUM E

Receiver's Motion for Declaratory Relief to Establish a Claim Bar Date and a Claim Filing Procedure; Receiver's Memorandum in Support of Motion for Declaratory Relief to Establish a Claim Bar Date and a Claim Filing Procedure (R. 791-835).

Annette W. Jarvis (1649)
Steven W. Call (5260)
Elaine A. Monson (5523)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Receiver and Attorneys for the Receiver, Annette W. Jarvis

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

IN RE OLYMPUS CONSTRUCTION, L.C.	**RECEIVER'S MOTION FOR DECLARATORY RELIEF TO ESTABLISH A CLAIM BAR DATE AND A CLAIM FILING PROCEDURE** Civil No. 020904299 Judge Tyrone Medley **(Hearing Requested)**

The Court-appointed receiver, Annette W. Jarvis (the "Receiver") of Olympus Construction, L.C., by and through her counsel of Ray Quinney & Nebeker, hereby moves the Court for declaratory relief to establish a claim bar date and a claim filing procedure in this case. This motion is being filed pursuant to the language of the Stipulated Order Approving Successor Receiver which provides in paragraph 4 as follows:

> Except as otherwise provided herein the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or reject claims all as

> **provided in Utah Code Ann. § 48-2c-1305 and 1306.** To the extent permitted by law, all claims filed against Olympus shall be adjudicated and determined by this Court in and as part of this proceeding. The Receiver may petition the Court, and the Court may order, expedited procedures for the adjudication and determination of claims, as may be appropriate and necessary for the prompt determination of claims.

See Exhibit A hereto at p. 3, ¶ 4. (Emphasis added). This motion is also supported by the memorandum of points and authorities and accompanying exhibits that have been filed concurrently herewith.

WHEREFORE, the Receiver respectfully requests that the Court enter an order as follows:

1. Approving the Notice of Deadline form which is attached to the memorandum as Exhibit C;

2. Approving the proposed Notice of Claim form which is attached to the memorandum as Exhibit D.

3. Establishing April 15, 2004, as the bar date for all claims to be filed against Olympus' receivership estate, or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2), and further ordering that to the extent creditor claims are not timely filed, they will be forever barred;

4. Establishing that the Receiver be given five business days from the date of the entry of the Court's order establishing the claims filing procedure to send by first class mail, postage prepaid, to all known creditors, at their last known address, both the Notice of Deadline and the Notice of Claim forms;

5. Approving the Publication Notice which is attached to the memorandum as Exhibit E, and further ordering that the Publication Notice need only be published in both the Salt Lake Tribune and The Record for three successive weeks as soon as possible following the entry of the Court's order establishing the claims filing procedure; and

6. Requiring that each creditor filing a claim against Olympus' receivership estate must either file the Notice of Claim form or a notice of claim that is substantially in the same form as the Notice of Claim, and which sets forth all of the information requested therein; and further requiring that all notices of claim must be executed and filed by the creditor under penalty of perjury; and further requiring that all creditors be required to send a copy of their Notice of Claim, along with copies of all supporting documents to the Receiver, or alternatively, that the creditor provide the Receiver with a detailed explanation as to why such documents are not available; and further requiring that only the original Notice of Claim be filed with the Clerk of the Third Judicial District Court, and that the documents supporting the claim only be sent to the Receiver, along with a copy of the Notice of Claim.

The Receiver further requests that the Court set a hearing date on this Motion.

DATED this 2nd day of December, 2004.

RAY QUINNEY & NEBEKER

Elaine A. Monson
Attorneys for the Receiver

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Receiver's Motion for Declaratory Relief to Establish A Claim Bar Date and A Claim Filing Procedure was mailed, postage prepaid, on this 2nd day of December, 2003 to the following:

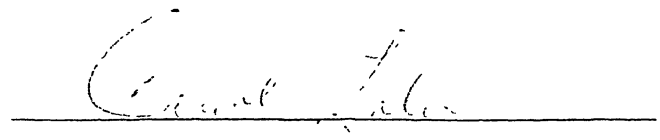
Rick Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111

James R. Blakesley
2595 East 3300 South, #320
Salt Lake City, UT 84109

Dwayne A. Vance
2200 North Park Avenue #D200
P.O. Box 682800
Park City, UT 84068

Joseph E. Wrona
1816 Prospector Avenue #100
P.O. Box 683670
Park City, UT 84068



738882.01/eam

Annette W. Jarvis (1649)
Steven W. Call (5260)
Elaine A. Monson (5523)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Receiver and Attorneys for the Receiver, Annette W. Jarvis

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

IN RE OLYMPUS CONSTRUCTION, L.C.	**RECEIVER'S MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY RELIEF TO ESTABLISH A CLAIM BAR DATE AND A CLAIM FILING PROCEDURE** Civil No. 020904299 Judge Tyrone Medley

The Court-appointed receiver, Annette W. Jarvis (the "Receiver") of Olympus Construction, L.C., by and through her counsel of Ray Quinney & Nebeker, hereby submits this memorandum in support of her motion for declaratory relief to establish a claim bar date and a claim filing procedure in this case. In support hereof, the Receiver represents as follows:

STATEMENT OF FACTS

1. On or about January 31, 2002, a Petition for Judicial Dissolution of Olympus Construction, L.C. ("Olympus") was filed in this Court.

2. On or about March 11, 2002, an Amended Petition for Judicial Dissolution of Olympus was filed in this Court.

3. On August 12, 2002, the members of Olympus entered into a Stipulation for Decree of Judicial Dissolution and Conversion of Custodian into Receiver (the "Stipulation"). The Stipulation was executed for the purpose of dissolving the working relationship between the members of Olympus in an orderly manner.

4. On August 20, 2002, based upon the Stipulation, the Court entered an Order of Decree of Judicial Dissolution and Conversion of Custodian into Receiver (the "Order of Dissolution").

5. Pursuant to the Order of Dissolution, the Court appointed Alan Funk as the receiver of Olympus and granted him "the normal and customary powers of a receiver."

6. Mr. Funk later submitted his resignation as the receiver of Olympus.

7. On May 5, 2003, the Court executed a Stipulated Order Approving Successor Receiver (the "Stipulated Order"), pursuant to which Annette W. Jarvis was appointed as the successor receiver of Olympus. (Ms. Jarvis shall hereinafter be referred to as the "Receiver" and a copy of the Stipulated Order is attached hereto as Exhibit A).

8. The Stipulated Order provides in paragraph 4 as follows:

> Except as otherwise provided herein **the Receiver may dispose of known and unknown claims against Olympus by notice and/or publication, may set dates for the barring of such claims and may accept or reject claims all as provided in Utah Code Ann. § 48-2c-1305 and 1306.** To the extent permitted by law, all claims filed against Olympus shall be adjudicated and determined by this Court in and as part of this proceeding. The Receiver may petition the Court,

> and the Court may order, expedited procedures for the adjudication and determination of claims, as may be appropriate and necessary for the prompt determination of claims.

See Exhibit A hereto at p. 3, ¶ 4. (Emphasis added).

9. Pursuant to the Receiver's duties as set forth in this Court's Stipulated Order the Receiver has consulted with the members of Olympus to establish the identity and the last known address of all persons or entities known or reasonably expected from Olympus' past operations to have a claim against Olympus' receivership estate. A list of the persons and entities identified by the Receiver as having possible claims against Olympus' receivership estate, along with their last known addresses, is attached hereto as Exhibit B.

10. The Receiver now seeks declaratory relief from the Court to establish a claims bar date and a claims filing procedure in this case.

11. The Receiver believes that the adoption of a claims bar date and a claims filing procedure will promote judicial economy, ensure the lawful, fair and expeditious resolution of claims against Olympus' receivership estate, and will greatly facilitate the preservation of Olympus' receivership estate by minimizing the administrative costs relating to claims filings.

12. Following the entry of an order establishing the claims bar and the claims filing procedure, the Receiver further plans to file a motion for declaratory relief to establish a claims adjudication process for all claims filed by the bar date.

DISCUSSION

I. STANDARD FOR GRANTING DECLARATORY RELIEF

Utah Code Ann. § 78-33-1 provides that a state court may make an order of declaratory relief in connection with a matter pending before it. The statute provides, in relevant part, as follows:

> The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final decree.

Correspondingly, Rule 57 of the Utah Rules of Civil Procedure provides that declaratory relief under Utah Code Ann. § 78-33-1 shall be brought pursuant to the Utah Rules of Civil Procedure. See U.R.C.P. 57. Rule 57 also provides that the mere existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate, and that the Court may order a speedy hearing on an action for declaratory judgment. Id.

Likewise, Rule 66(e) of the Utah Rules of Civil Procedure provides that a receiver, has under the direction of the court, the power to generally do such acts respecting the receivership property as the court may authorize.

As contemplated by paragraph 4 of the Stipulated Order, the Receiver asserts that declaratory relief is appropriate to establish a claims bar date and a claims filing procedure whereby notice of the right to file a claim in this receivership proceeding will be given to all

potential creditors of Olympus' receivership estate, and uniform procedures for filing a notice of claim will be established.

II. THE RECEIVER'S PROPOSED CLAIMS BAR DATE AND CLAIMS FILING PROCEDURE

The Receiver proposes April 15, 2004, at 4:30 p.m. (MST), or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2), as the bar date for creditors to file claims against Olympus' receivership estate and further proposes the following claims filing procedure:

A. Proposed Form for Notice of Deadline for the Filing of Notice of Claim.

Attached hereto as Exhibit C is the Receiver's proposed Notice of Deadline for the Filing of Notice of Claim (the "Notice of Deadline") which she proposes to send to all known persons or entities who may have claims against Olympus' receivership estate. The Notice of Deadline contains, inter alia, the following:

(1) the bar date and time by which a Notice of Claim must be filed;

(2) notice that Olympus was placed into receivership by this Court on August 20, 2002;

(3) notice that the Receiver is in the process of collecting and selling the assets of Olympus, and that to the extent enough money is collected, distributions will be made to creditors;

(4) notice that the person or entity may be a creditor of Olympus;

(5) notice that the potential creditor can consult with their own attorney;

(6) information regarding the Notice of Claim form which will accompany each Notice of Deadline mailed to known creditors;

(7) a general description of who is required to file a Notice of Claim and the definition of what constitutes a claim;

(8) information regarding when and where creditors must file their Notice of Claim;

(9) information regarding how the Notice of Claim must be signed and what documents should accompany the copy of the Notice of Claim which is sent to the Receiver; and

(10) notice that failure to timely file a Notice of Claim by the bar date will forever estop and bar the creditor from filing a claim against Olympus' receivership estate.

(11) notice that the filing of a claim does not necessarily mean that it will be allowed, and that the Receiver retains the right to review and object to all or a portion of any claim filed.

The Receiver asserts that the proposed Notice of Deadline contains all of the necessary notices and information regarding how, when and where potential creditors must file their claims against Olympus' receivership estate as required by Utah Code Ann. § 48-2c-1305. That statute provides in pertinent part as follows:

> (2) A company in winding up electing to dispose of known claims pursuant to this section may give written notice of the company's dissolution to known claimants at any time after the effective date of the dissolution. The written notice must:
>
> (a) describe the information that must be included in a claim;
> (b) provide an address to which written notice of any claim must be given to the company;
> (c) state the deadline, which may not be fewer than 120 days after the effective date of the notice, by which the dissolved company must receive the claim; and
> (d) state that, unless sooner barred by another state statute limiting actions, the claim will be barred if not received by the deadline.

Utah Code Ann. § 48-2c-1305.

Therefore, the Receiver moves the Court to approve the Notice of Deadline attached hereto as Exhibit C.

B. Proposed Notice of Claim Form.

Attached hereto as Exhibit D is the Receiver's proposed Notice of Claim form which she proposes to enclose with the Notice of Deadline which will be mailed to all known creditors of Olympus' receivership estate, and which the Receiver will also provide to any potential creditors requesting a copy thereof. The proposed Notice of Claim form contains, inter alia, the following:

(1) the date and time by which a Notice of Claim must be filed;

(2) a blank space for the name and address of the creditor;

(3) information regarding when and where a creditor must file their Notice of Claim;

(4) a blank space for the creditor to identify the specific parcel of property to which its claim is related;

(5) a blank space for the basis and description of the creditor's claim;

(6) blank spaces to identify the date the claim was incurred and if there has been a court judgment against Olympus, the date it was obtained;

(7) a blank space for the amount of the creditors claim;

(8) a space in which the creditor can identify whether it believes its claim is secured, and if so, requesting information relating to the collateral securing the claim;

(9) a blank space for the Notice of Claim to be signed by the creditor under penalty of perjury;

(10) information regarding what documents should accompany the Notice of Claim; and

(11) notice that failure to timely file a Notice of Claim by the bar date will forever estop and bar the creditor from filing a claim against Olympus' receivership estate.

The Receiver asserts that the proposed Notice of Claim form contains all of the necessary information which will allow potential creditors to set forth the amount and basis for their claims against Olympus' receivership estate, as well as notices regarding how, when and where potential creditors must file their claims. Therefore, the Receiver moves the Court to approve the proposed Notice of Claim form attached hereto as Exhibit D.

C. Proposed Bar Date for All Claims Filings.

The Receiver proposes April 15, 2004, at 4:30 p.m. (MST), or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2), as the bar date for creditors to file claims in Olympus' receivership estate. This deadline complies with Utah Code Ann. § 48-2c-1305(2)(c) which states that the bar date for companies in the winding up process should not be fewer than 120 days after the effective date of the notice of the right to file a claim. This deadline will allow all potential creditors more than sufficient time to review their records and determine whether they have legitimate claims that should be filed against Olympus's receivership estate.

In addition, the Notice of Deadline and the Notice of Claim forms both contain language that if a claim is not timely filed by the bar date, then a creditor will be forever stopped and barred from filing a claim against Olympus' receivership estate.

The Receiver moves the Court to approve April 15, 2004, at 4:30 p.m. (MST) or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2), as the bar date for all creditor claims to be filed against Olympus' receivership estate,

and further ordering that to the extent creditor claims are not timely filed, they will be forever barred.

D. Known Creditors to Whom the Notice of Deadline and Accompanying Notice of Claim Must Be Sent By the Receiver.

One of the tasks undertaken by the Receiver since her appointment is to identify all persons or entities who may have claims against Olympus' receivership estate so that notice can be provided to them of their right to file a claim. Accordingly, the Receiver has consulted with the members of Olympus to establish the identity and the last known address of all persons or entities known or reasonably expected from Olympus' past operations to have a claim against Olympus' receivership estate. A list of those persons and entities identified by the Receiver as potential creditors is attached hereto as Exhibit B.

The Receiver moves that she be given five business days from the date of the entry of the Court order establishing the claims filing procedure to send by first class mail, postage prepaid, to all known creditors, at their last known address, both the Notice of Deadline and the Notice of Claim forms.

E. Notice By Publication to Unknown Creditors.

Notwithstanding the Receiver's attempt to identify all potential creditors of Olympus' receivership estate, the Receiver is cognizant that there may be some creditors whose identities either cannot be ascertained from her investigation of potential claims, or are unknown for some other reason. Accordingly, the Receiver moves the Court that she be allowed to publish notice of Olympus' dissolution in newspapers of general circulation in Utah pursuant to which notice will

be provided that all persons with claims against Olympus' receivership estate must present them by the bar date and in accordance with the notice as contemplated in Utah Code Ann. § 48-2c-1306. That statute provides in pertinent part as follows:

> (1) A dissolved company in winding up may publish notice of its dissolution and request that persons with claims against the company present them in accordance with the notice.
>
> (2) The notice contemplated under Subsection (1) must:
>
> (a) be published once a week for three successive weeks in a newspaper of general circulation in the county where the dissolved company's designated office, or, if it has not designated office in this state, its registered office, is or was last located;
>
> (b) describe the information that must be included in a claims and provide an address to which written notice of any claim must be given to the company;
>
> (c) state the deadline, which may not be fewer than 120 days after the first date of publication of the notice; by which the dissolved company must receive the claim; and
>
> (d) state that, unless sooner barred by another statute limiting actions, the claim will be barred if not received by the deadline.

Attached hereto as Exhibit E is the proposed Notice of Deadline for the Filing of Notice of Claim Against Olympus Construction, L.C. (the "Publication Notice") that the Receiver proposes to publish in both the Salt Lake Tribune and the The Record for three successive weeks as soon as possible following the entry of the Court's order establishing a claims filing procedure.

The Publication Notice is similar to the Notice of Deadline, and contains essentially the same information contained in the Notice of Deadline, as more particularly described in Section II. A above, except that the Publication Notice contains information that the creditor can obtain a

Notice of Claim form from the Receiver or alternatively explains what information must be contained in any notice of claim filed with the Clerk of the Third Judicial District Court in Olympus' receivership case.

The Receiver asserts that the proposed Publication Notice contains all of the necessary notices and information regarding how, when and where potential creditors must file their claims against Olympus' receivership estate as required by Utah Code Ann. § 48-2c-1306.

Therefore, the Receiver moves the Court to approve the Publication Notice attached hereto as Exhibit E, and further moves that the Publication Notice must only be published in the Salt Lake Tribune and The Record for three successive weeks as soon as possible following the entry of the Court's order establishing a claims filing procedure.

F. What Must be Filed by Each Creditor and How Notice of Claim Must be Executed.

The Receiver contends that Olympus' receivership estate would be greatly benefited if there is uniformity in the notice of claims that are filed. This will assist the Receiver in analyzing claims, help eliminate frivolous claims, and reduce the administrative costs and expenses to the estate with respect to the adjudication of claims.

Accordingly, the Receiver moves the Court to require that each creditor filing a claim against Olympus' receivership estate must either file the Notice of Claim form or a notice of claim that is substantially in the same form as the Notice of Claim, and which sets forth all of the information requested therein.

The Receiver further moves the Court that all notices of claim must be executed by the creditor and filed under penalty of perjury.

Finally, the Receiver further moves that all creditors be required to send a copy of their Notice of Claim, along with copies of all supporting documents sufficient to the Receiver. The supporting documents will enable to Receiver to evaluate the claims and determine whether they should be allowed or objected to. If supporting documents are not available, then the Receiver moves that the creditor be required to provide the Receiver with a detailed explanation as to why such documents are not available.

In addition, to reduce the amount of documents that are filed with the Clerk of the Third Judicial District Court, the Receiver further moves the Court to require that only the original Notice of Claim be filed with the Clerk of the Third Judicial District Court, and that the documents supporting the claim be sent only to the Receiver, along with a copy of the Notice of Claim.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Receiver respectfully requests that the Court enter an order as follows:

1. Approving the Notice of Deadline form attached hereto as Exhibit C;

2. Approving the proposed Notice of Claim form attached hereto as Exhibit D.

3. Establishing April 15, 2004, at 4:30 p.m. (MST), or as soon thereafter to comply with the 120 day notice requirement set forth in Utah Code Ann. § 48-2c-1305(2), as the bar date

for all claims to be filed against Olympus' receivership estate, and further ordering that to the extent creditor claims are not timely filed, they will be forever barred;

4. Establishing that the Receiver be given five business days from the date of the entry of the Court's order establishing the claims filing procedure to send by first class mail, postage prepaid, to all known creditors, at their last known address, both the Notice of Deadline and the Notice of Claim forms;

5. Approving the Publication Notice attached hereto as Exhibit E, and further ordering that the Publication Notice need only be published in both the Salt Lake Tribune and The Record for three successive weeks as soon as possible following the entry of the Court's order establishing the claims filing procedure; and

6. Requiring that each creditor filing a claim against Olympus' receivership estate must either file the Notice of Claim form or a notice of claim that is substantially in the same form as the Notice of Claim, and which sets forth all of the information requested therein; and further requiring that all notices of claim must be executed and filed by the creditor under penalty of perjury; and further requiring that all creditors be required to send a copy of their Notice of Claim, along with copies of all supporting documents to the Receiver, or alternatively, that the creditor provide the Receiver with a detailed explanation as to why such documents are not available; and further requiring that only the original Notice of Claim be filed with the Clerk of the Third Judicial District Court, and that the documents supporting the claim must only be

sent to the Receiver, along with a copy of the Notice of Claim.

DATED this 2nd day of December, 2004.

RAY QUINNEY & NEBEKER

Elaine A. Monson
Attorneys for the Receiver

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Receiver's Memorandum In Support of Motion for Declaratory Relief to Establish A Claim Bar Date and A Claim Filing Procedure was mailed, postage prepaid, on this 2nd day of December, 2003 to the following:

Rick Knuth
Jones, Waldo, Holbrook & McDonough
170 South Main #1500
Salt Lake City, UT 84101

Darryl J. Lee
Wood Crapo LLC
60 East South Temple #500
Salt Lake City, UT 84111

James R. Blakesley
2595 East 3300 South, #320
Salt Lake City, UT 84109

Dwayne A. Vance
2200 North Park Avenue #D200
P.O. Box 682800
Park City, UT 84068

Joseph E. Wrona
1816 Prospector Avenue #100
P.O. Box 683670
Park City, UT 84068

Carol Lee

731228.01/eam

ADDENDUM F

Uniform Limited Liability Company Act, § 807 (1996); Model Business Corporations Act, § 14.06 (3rd ed. 2002)

UNIFORM LIMITED LIABILITY COMPANY ACT (1996)

Section 807. Known Claims Against Dissolved Limited Liability Company.

(a) A dissolved limited liability company may dispose of the known claims against it by following the procedure described in this section.

(b) A dissolved limited liability company shall notify its known claimants in writing of the dissolution. The notice must:

(1) specify the information required to be included in a claim;

(2) provide a mailing address where the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the written notice is received by the claimant; and

(4) state that the claim will be barred if not received by the deadline.

(c) A claim against a dissolved limited liability company is barred if the requirements of subsection (b) are met, and:

(1) the claim is not received by the specified deadline; or

(2) in the case of a claim that is timely received but rejected by the dissolved company, the claimant does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of the rejection.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

{Model Business Corporation Act provision on following page}

MODEL BUSINESS CORPORATION ACT
3rd Edition (Rev. through 2002)

§ 14.06. Known Claims Against Dissolved Corporation.

(a) A dissolved corporation may dispose of known claims against it by notifying its known claimants in writing of the dissolution at any time after its effective date.

(b) The written notice must:

(1) describe information that must be included in a claim;

(2) provide a mailing address where a claim may be sent;

(3) state the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(4) state that the claim will be barred if not received by the deadline.

(c) A claim against a dissolved corporation is barred:

(1) if a claimant who was given written notice under subsection (b) does not deliver the claim to the dissolved corporation by the deadline; or

(2) if a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.